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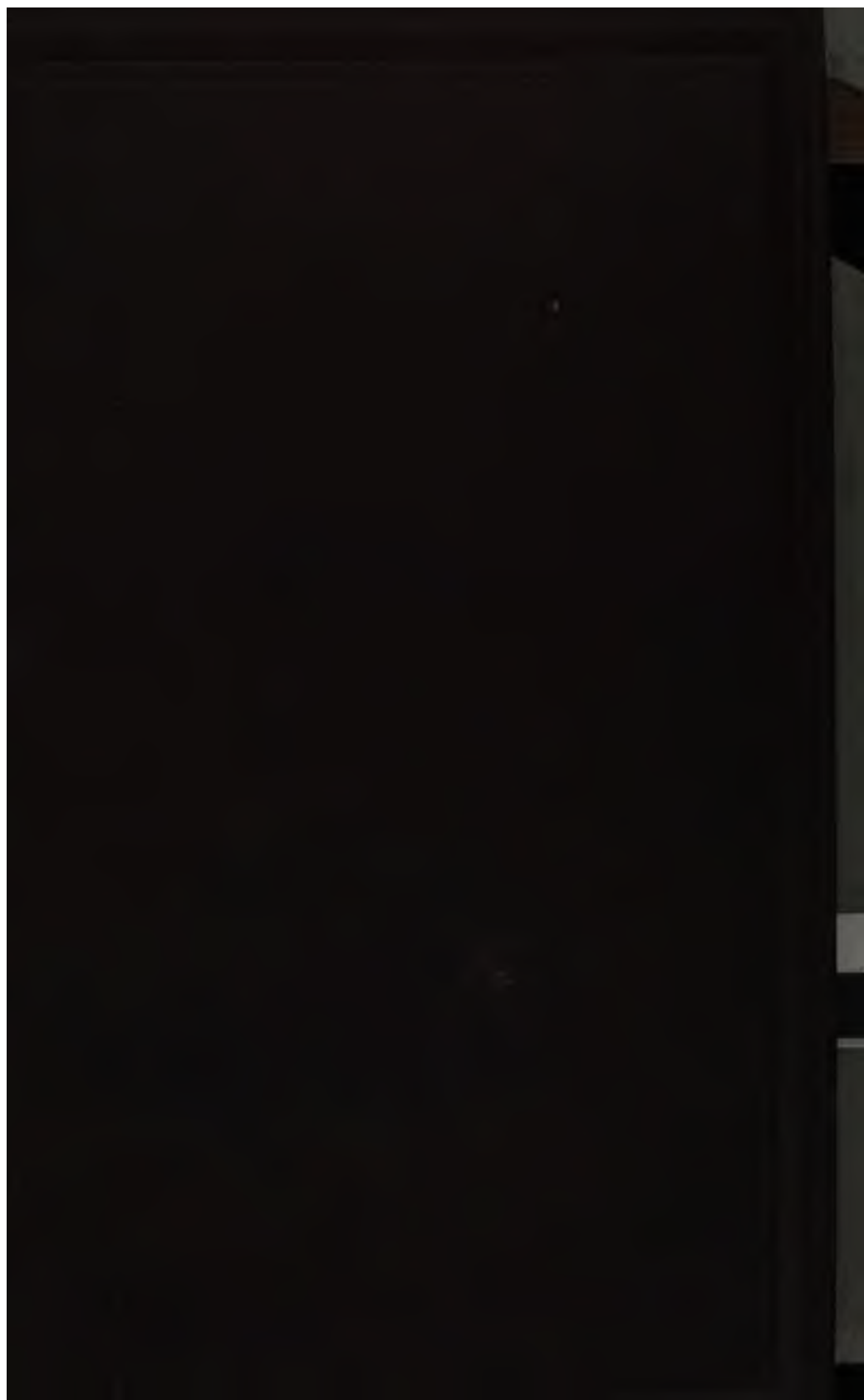
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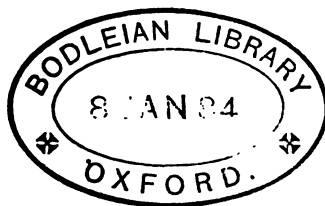
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ANALYSIS AND DIGEST
OF THE
DECISIONS OF SIR GEORGE JESSEL
LATE MASTER OF THE ROLLS
WITH ⁴¹⁸/_—
FULL NOTES, REFERENCES AND COMMENTS,
AND COPIOUS INDEX.

BY
APSLEY PETRE PETER,
SOLICITOR; LAW SOCIETY PRIZEMAN.

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P R E F A C E.

NO EULOGY which has been assigned to the late Sir George Jessel is undeserved. For wide learning and deep insight his judgments are, perhaps, unsurpassed. They range over nearly the whole field of equity jurisprudence, and diverge occasionally into common law regions. He marshalled previous decisions with breadth of thought and grasp of distinguishing detail, and rapidly swept from the books a mass of bad law. Upon the construction of documents he was a very great authority. He never fettered himself with previous decisions upon other instruments, except as a last resort, pointing out that the tendency of successive cases is a drifting further and further from their foundation, and to be refinements upon one another. His association with the vast alterations effected by the Judicature Acts is, moreover, well understood. It was the constant effort of Sir George Jessel to make equity consonant with the spirit and necessities of the times, and, avoiding technicalities, to get, in the most expeditious and least expensive manner, to the proper result. For this reason

he was the favourite judge with solicitors, and so had an exceptional variety of cases. As he became a Member of the Appellate Court within a short time from his original appointment, his judgments thus had a wider scope. The head of our profession (Lord Chancellor Selborne) thus recently spoke of him: "A man of extraordinary mental gifts, of a rapidity, an acuteness, an energy, a power of doing work which I have certainly never known surpassed, I think, perhaps, never equalled; and to those qualities he joined a most remarkable accuracy of judgment. He seemed naturally to come to the point at once, and always, or almost always, to hit the right nail on the head." Justice Pearson has said of him: "He put more law into his decisions than almost any other judge of whom I know." Justice Chitty, Mr. H. Davey, Q.C., and the other members of the Bar who practised before him, are never tired of testifying to Sir George Jessel's lucidity and depth of learning. The writer of any modern legal treatise necessarily cites "Sir George Jessel" at almost every page, and acknowledges the services rendered by him. Therefore, although ordinarily the judgments of any special judge might be deficient in general interest because of the accidental nature of the subjects with which he has had to deal, this is not so with those of Sir George Jessel.

The writer has endeavoured to set out and analyze the reasons as given in all important cases affecting principles, and to refer, in the notes and comments, to useful analogous decisions. He has preferred to give the cases in order of date, referring to the other later decisions, and to make the Index full, rather than to attempt classification under subjects. A glance at the indices will enable easy reference to cognate cases. The writer has had to prepare the work amidst his other professional duties; entirely unaided, even in the revising; in a remote part of the country, and with only his own law library. Moreover, he has felt that the usefulness of such a book depends considerably on speedy publication. These circumstances must be his excuse for any imperfections which may exist. He is not without hope that the work may be useful to both the practitioner and student.

Attention to the Addenda, &c. will be desirable.

The margins leave ample spaces for annotation of subsequent decisions.

A. P. P.

November, 1883.

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- Page 2, line 17—line to run thus “prevented the Statute from running against the personal estate up to the date of the last of them.”
- „ 57, last line, after “pro tanto,” add—of a provision made by A.’s will for B., in common with other members of B.’s family to whom A. was *not* in loco parentis.
- „ 174, note to *Flower v. Low Leyton Local Board*—Principle approved in *Holder v. Mayor of Margate*, 11 Q. B. D. 711; 52 L. J., Q. B. 711. Notice of intended action of *ejectment*, or of one of that nature, is not necessary. But if it can be reasonably inferred that the act complained of was “done or intended to be done or omitted to be done” under the powers of the statute, sect. 264 applies. *Midland Railway Co. v. Withington Local Board*, 52 L. J., Q. B. 689, and leading article in 47 J. P. 691.
- „ 176, note after line 25—Neither is a solicitor to the company, in that character, a “promoter” liable under sect. 165. Per V.-C. Bacon in *Re Great Wheat Polgooth (Limited)*, 47 J. P. 710.
- „ 266, *Kearsley v. Philips*, 52 L. J.—“Q. B.” for Ch.; and add—L. R., 11 Q. B. 621.
- „ 273, line 17 to read thus—against remoteness, and there are daughters, the husband and wife having the power can appoint to such daughters with
- „ 274, line 14 of *Mason v. Harris*—“plaintiffs” for plaintiff.
- „ 289, line 3 of *Minors v. Battison*—“observation” for observations.
- „ 290, line 4 from bottom—“ether” for either.
- „ 307, note to *Emmins v. Bradford*—The settlement here, therefore (one made on the second marriage of a widow), was held to exclude a child by her former marriage. The language of settlements on second marriage should be so framed as to avoid this result.
- „ 312, first line—read “J. O.” for T. O.
- „ 330, line 17—obliterate the comma after “residuary,”
- „ 336, line 14—read “not” *bonâ fide*.
- „ 336, *Re Goodman’s Trusts*—add reference to L. R., 17 Ch. Div. 266, for case on appeal.
- „ 337.—Comment on *Re Goodman’s Trusts*. See *Re Andros, Andros v. Andros*, 52 L. J., Ch. 793, where Kay, J., held the law to be that a bequest of personality, in an English will, to the children of a foreigner, meant such children as were legitimate by the law of the foreign father’s country of domicile at the time of their birth.
- „ 412, line 10—“outer” doors for enter doors.
- „ 482, note to *Sutton v. Sutton*—*Hunter v. Nockolds*, 1 Mac. & G. 640, 651, is herein disapproved.
- „ 483, add note to *Ridler v. Ridler*, and read as part of the note of the case—This settlement was held bad as against creditors, for the settlor, knowing the circumstances of R. H. R., should have reckoned the amount guaranteed for, and then due from him, as a debt in existence at its date, but could not reckon the debt from R. H. R. as an asset. Therefore the deed left the settlor with insufficient assets to discharge his then liabilities.
- „ 496, note to *Ward v. Morse*—Under the new Order LXV. rule 2, “When issues in fact and law are raised upon a claim or counterclaim, the costs of the several issues respectively, both in law and fact, shall, unless otherwise ordered, follow the event.”

General Index.

tit. *Appropriation*, in payment what is not—add reference to p. 398.

Companies, add after last present reference—double contemporaneous petitions, 198, 433.

Power of Sale, distinguished from a trust for—add reference to p. 466.

Solicitor, lien only for costs payable to client—add reference to p. 260.

Index to Cases.—Add *Miles v. Jarvis* and *Great Wheat Polgooth (Re)*, and note. See “Addenda” for these.

In *Lechmere v. Lloyd*, L. R., 18 Ch. Div. 524, the M. R. declined to follow *Brackenbury v. Gibbons*, L. R., 2 Ch. D. 417; and in *Miles v. Jarvis*, 52 L. J., Ch. 796, Kay, J., adopted the view of the M. R. Under a devise of freeholds to a wife for life, and from and after her decease unto all and every the children of the testator’s son “living at the time of the decease of his (the said testator’s) said wife, or thereafter to be born,” equally, as tenants in common, the gift in remainder was held to be an executory devise, and not a contingent remainder. True that there is a rule that a gift which can take effect as a contingent remainder shall not be treated as an executory devise, but this gift could not be so treated, for otherwise children born after the death of the wife [or in *Lechmere v. Lloyd*, attaining 21, or as to females marrying, after the death of the wife] could not take, whereas the obvious intention was that they should take. Consequently all the children of the son, whenever born [or, in the *Lechmere Case*, as above], were entitled to share.

DECISIONS OF SIR G. JESSEL, M.R.

Boatwright v. Boatwright.

[43 L. J. R., Ch. 12; L. R., 17 Eq. 71.]

A TESTATOR owed 100*l.* to the plaintiff upon a promissory note. The testator had regularly paid the interest during his lifetime. By his will he devised all his real estate to his wife during her widowhood, and, after her death or marriage, he directed his executrix (his daughter) to sell his real estate; and he bequeathed all his personal estate to his wife for life, subject to the payment of his debts, funeral and testamentary expenses. Testator died January 13, 1857. Thereupon his widow took possession of his personal estate, which consisted of a few articles of furniture worth about 5*l.*, and entered into possession of his real estate, which produced about 24*l.* a year. She also for some time paid the plaintiff interest on his promissory note, the last payment being made February 1, 1864. The will was not proved until September 27, 1870, the testator having directed his wife not to part with it while she lived. Probate was ultimately compelled by proceedings instituted by the plaintiff, in the course of which the widow was imprisoned for contempt in not having obeyed an order to bring the will into the Probate Court to be proved.

On December 1, 1870, the plaintiff filed a bill for the administration of the real and personal estate of the testator. The defence was the Statute of Limitations.

Held, that the debt was barred by the Statute of Limitations, and that the bill must be dismissed with costs. For—

1. The cause of action accrued in the testator's lifetime, therefore it was immaterial whether the will was proved or not.

2. If payment by the tenant for life of the real estate prevented the statute from running against the personal estate, it would run against the real estate from the date of the last payment, and therefore against the personal estate also.
3. Time being thus a bar, the mere fact that you could make the legal personal representative a party to a suit against the real estate cannot be material. If the suit cannot proceed in the absence of a personal representative, the result would be that, having lost the remedy against the personal estate, that against the real estate would be lost also; and, if the remedy against the real estate is to be kept alive, that against the personal estate must be kept alive also. [But held not necessary to decide that point then, as the M. R. held that the executrix assented to the payments, and so prevented them from running up to the date of the last of them—more than six years before bill filed.]

COMMENTS.

The argument on the part of the plaintiff was, that when the Statute of Limitations does not begin to run until after a testator's death, it does not begin to run until a personal representative is appointed.

In *Williams on Executors* the rule is thus stated: "If time has once begun to run against a debt in the debtor's lifetime, it does not afterwards cease to run during the period which may elapse between his death and the time at which a personal representative is constituted to him."

In the above case the widow might have been sued as executrix *de non tort*, or the proceedings to compel probate could have been taken earlier. (*Webster v. Webster*, 10 Ves. 93, is, as Mr. Fry (*arguendo*) said, really exactly in point.)

On the other hand, "the law is that, if the statute has not begun to run in the lifetime of an intestate, it will not begin to run until letters of administration are taken out to his estate."

Thus, if the case be one of principal against agent, and an agency is continuing at the death of the principal, no debt accrues until after that time, nor until letters of administration are taken out to his estate (*Burdick v. Garrick*, 39 L. J. R., Ch. 369; L. R., 5 Ch. 233, App.).

Sidney v. Sidney.

[43 L. J. R., Ch. 15; L. R., 17 Eq. 65.]

A testator, by his will, said: "Whereas there is due to me from my son 1,440*l.*, or thereabouts, secured by bills, or notes, or otherwise, I release my said son from the payment of any interest up to the time of my death, and I direct that he shall have time for payment of the said sum by paying one-sixth in every year next after my death." He afterwards made a codicil, whereby he confirmed his will.

The son paid the debts due at the date of the will, amounting to about 1,440*l.*, and afterwards incurred fresh debts to his father of about 1,300*l.*, which were due at the date of the codicil, and at the death of the testator.

Held, that the legacy was specific; that it was adeemed by payment of the debt; and that the confirmation of the will by the codicil did not give the son any benefit in respect of the debts then due—*i. e.* that he had not six years in which to pay.

The M. R. said the question was how far section 24 of the Wills Act applied to gifts of legacies as distinguished from gifts of residue.

1. If the will, in this case, meant a specific, then-existing sum, it was conceded that the mere fact of a codicil being made confirming it did not alter the nature of the gift [and could not re-create or restore a sum or thing which was gone].
2. If, on the other hand, this was a "class" gift—*i. e.* of a class of subjects subject to increase or diminution—it is said that after-acquired subjects are included.
3. The description here is very specific; the very securities for the debts are mentioned, as in *Smallman v. Goolden*, 1 Cox, 329 (1787). That case is much stronger, because the sum is not, in it, mentioned. [In that case, a testator gave to his son "all sum and sums of money due to me from him, on bond or bonds, or any other

security." The son was indebted to the testator on one bond at date of will, and afterwards became indebted on another bond. It was held that the latter debt was not included in the bequest.]

4. The only remaining question is, What effect had the codicil? If the legacy was adeemed, it could not be argued that the codicil gave a new sum (*Montague v. Montague*, 15 Beav. 565).
5. The "interest" spoken of plainly means the interest on the 1,440*l.*; and, therefore, no effect can be given to that clause.

COMMENTS.

The effect of the republication of a will by a codicil is, generally stated, that the confirmation is tantamount to a repetition of the words in the will (*Winter v. Winter*, 16 L. J. R., Ch. 112; 5 Hare, 306: V.-C. Wigram). In the case above cited the question was one of the ademption of a specific legacy. Of course, the incidents of such a legacy remained. The specific thing was gone. Had the legacy been a general pecuniary legacy the codicil would have restored it. Thus, in *Anderson v. Anderson*, L. R., 13 Eq. 381, a legatee under a will was an attesting witness, so that the legacy by that will was void; but, by a codicil attested by disinterested witnesses, confirming the will, the legacy was held to be revived. Illustrating the difference to which the Master of the Rolls refers as between class gifts and specific gifts is the case of *Doe d. York v. Walker*, 12 L. J. R., Exch. 153; 12 Mee. & W. 591, where there was a will, made before the Wills Act, devising all lands at B.; a codicil, made after the Act, appointing an additional trustee, and in other respects confirming the will. After the codicil the testator purchased other lands at B., and they were held to pass by the will. So *Wagstaffe v. Wagstaffe*, 38 L. J. R., Ch. 528; L. R., 8 Eq. 229, where after-acquired property was held to pass under a gift of "any other property I may now possess;" and *Trinder v. Trinder*, L. R., 1 Eq. 695, where after-acquired shares were held to pass under a gift of "my shares in the Great Western Railway" (*Sed qu.*).

For an elaborate and adopted dissertation as to what are specific legacies see also *Bothamley v. Sherson* (*infra*).



Maxfield v. Burton.

[43 L. J. R., Ch. 46; L. R., 17 Eq. 15.]

A. deposited the deeds of an estate with his bankers, and signed a memorandum charging the estate with payment of a sum due from him to them. He afterwards married, and, in consideration of such marriage, he settled the estates by articles, and, shortly after marriage, executed a settlement conveying the legal estate to a trustee. During the negotiations he told the lady's solicitors that he was entitled to the estate free from incumbrances, and that the deeds were at his bank for safe custody only.

Held, that the solicitor ought to have inquired from the bankers whether they had a charge upon the property comprised in the deeds, and that, as he omitted to do so, all persons claiming under the settlement were fixed with constructive notice of the charge.

There was authority that the obligation of a purchaser to investigate a title applied to a purchaser by marriage (*Jackson v. Roze*, 4 L. J. R. (O. S.), Ch. 118 (1826); 2 Sim. & S. 472; and *Wormald v. Maitland*, 35 L. J. R., Ch. 69; 13 W. R. 832 (1865)).

The M. R. decided on the ground of constructive notice; but said that, as the memorandum with the bankers contained a contract to convey the legal estate, he would not have held that the man who signed the contract could afterwards exclude the mortgagee claiming under it by a subsequent conveyance of the legal estate. He was not however sure that he would go so far as the illustration in *Sharples v. Adams*, 32 Beav. 213.

COMMENTS.

An entire omission to inquire for deeds fixes a purchaser or mortgagee with constructive notice of deposit of them elsewhere. If inquiry, however, be made, and a reasonable excuse is given for their absence, the purchaser taking the legal estate gets a good title. A trustee for A. cannot, however, by conveying the legal estate to B., give B. a better title than A. But, as between mortgagees, the question is generally this: Are the equities of the mortgagees equal? If so, the fact that the legal estate is in one of them gives that one the preference.

Consider *Dixon v. Muckleston*, 42 L. J. R., Ch. 210, hereon;

L. R., 8 Ch. 155. There a person who advanced money upon a letter amounting to an equitable charge, accompanied by an ancient title deed, and who was held to have honestly given credit to the debtor's assertion that the creditor was in possession of the necessary title deeds, was held entitled to priority over a subsequent mortgage effected by deposit of all the subsequent title deeds sufficient to show a good title down to the conveyance to the borrower. The authorities as to the effect of neglect to inquire are there fully considered.



Marler v. Tommas.

[43 L. J. R., Ch. 73; L. R., 17 Eq. 8.]

A married woman executed a voluntary settlement containing a recital that she had paid 2,000*l.* to the trustee, and declaring trusts of the sum. As a fact, she had not paid, and never did pay, any sum of money to the trustee. The trustee also executed the deed.

Held, that neither the settlor nor the trustee incurred any obligation whatever in respect of the 2,000*l.*

The settlement was on herself for life, with remainder as she might appoint, and in default for her children, and if she had no children, for her next-of-kin. The husband died a few days after the settlement was made; there were no children. The wife also dying, the next-of-kin sought to have the 2,000*l.* raised out of her assets.

Held, that this could not be done. The agreement was voluntary only, and nothing had been done under it.

By the same settlement, shares were settled on trust for such persons as the wife might by deed or will appoint. By a transfer under her hand and seal she transferred the shares to herself.

Held, that this was a valid appointment by the wife in her own favour (*Fletcher v. Green*, 33 Beav. 426 explained).

COMMENTS.

As to the first point, evidence having been admitted, the *prima facie* case arising out of the statement in the deed was displaced. A mere recital of possession of trust money does not, unless

there be an express or implied covenant to repay, convert the debt into a specialty debt (*Brook v. Harwood*, 37 L. J. R., Ch. 209; L. R., 3 Ch. 225). If, however, the deed contains an agreement to give a security, which, if given, would be a specialty, the debt will be converted into a specialty debt (*Saunders v. Milsome*, L. R., 2 Eq. 573). The mere acknowledgment of a debt in a deed, for a purpose collateral to that for which the deed was executed, will not raise an implied covenant to repay (*Jackson v. The North Eastern Rail. Co.*, L. R., 7 Ch. D. 573; 47 L. J., Ch. 303).

Robinson v. Evans.

[43 L. J. R., Ch. 82.]

A fund was settled on A. for life, then on any husband she might leave, for life, then on her children, and, in default of children, "on the person or persons who should happen to be her legal personal representative or representatives at the time of her death."

Held, that this meant next-of-kin according to the Statute, and to them as tenants in common in the shares provided by the Statute of Distribution. For—

1. This was not a possible description of an *administrator*, who could not be appointed until after her decease.
2. The husband already took a life interest, and he would be the wife's administrator if he survived. It was extremely improbable that the settlor intended the husband in that event to take the fund absolutely.
3. It was true that, as laid down in *In re Crawford's Trusts*, 2 Drew. 230, this was the secondary meaning of words having a technical signification, to adopt which secondary meaning strong reasons were necessary. Here there were these strong reasons.

COMMENTS.

In this and in another case (heard on the same day) the M. R. laid it down that, in questions as to construction of a document, authorities could only be usefully cited (1) when they explained technical terms, or (2) enunciated general principles, referring to *Grey v. Pearson*, 26 L. J. R., Ch. 473; 6 H. L. Cas. 61 (Lord Wensleydale's judgment), in support of his proposition. And in *Ex parte Willey, re Wright*, 52 L. J., Ch. 546,

the M. R. further said that (1) antiquity of decisions (although disapproved), and (2) the practice of mankind following them, as concurring facts, alone justified a blind adherence to previous judicial opinions on questions of construction.

The infinite variety of wills and other documents, and the fact that the intention can only be gathered from the document itself, and the surrounding circumstances, sufficiently warrant the proposition. Any breach of it can only lead to a multiplication of technical terms. It is the last resort to impute to a testator intimate knowledge of technical phrases. Rules of construction themselves may also be said to be last resorts. The intention of that which is written is, by the first canon, always the guide. All general rules contain the exception, "unless a contrary intention appear" from the document itself. Compare *In re Best's Settlement Trusts*, 43 L. J. R., Ch. 545; L. R., 18 Eq. 686 (V.-C. Hall).

Tillett v. Pearson.

[43 L. J. R., Ch. 93.]

A judgment creditor, who has sued out an *elegit* and got a return from the sheriff that the debtor was entitled to a life estate in realty, and who has registered the writ, may, by action in the Court of Chancery, obtain the appointment of a receiver of that estate (see *Yescombe v. Landor*, 28 L. J. R., Ch. 876; 28 Beav. 80).

COMMENT.

For the M. R.'s subsequent explanation of this case see *The Anglo-Italian Bank v. Davies*, 47 L. J., Ch. App. 833; L. R., 9 Ch. D. 275 (*post*, p. 233).

Rowsell v. Morris.

[43 L. J. R., Ch. 97; L. R., 17 Eq. 20.]

A bill for administration of the estate of, or for the execution of the trusts of the will of, a deceased testator cannot be sustained against an executor *de son tort*, unless the legal personal representative is also before the court as a party. Two recent decisions of Vice-Chancellor Malins to the contrary—viz. *Rayner v. Koehler*, 41 L. J. R., Ch. 697; L. R., 14 Eq. 262; and *Coote v. Whittington*, 42 L. J. R., Ch. 846; L. R., 16 Eq. 534—disapproved. If the defect

appears on the face of the bill or statement of claim, a defendant, who had not raised the objection by answer or statement of defence, but who raised it at the hearing, would be allowed costs of the day.

The correct rule, as above held, was also laid down by Lord Cottenham in *Penny v. Watts*, 16 L. J. R., Ch. 146; 2 Ph. 149 (see also *Cary v. Hills*, 42 L. J. R., Ch. 100; L. R., 15 Eq. 79. The only relief which could be given in the absence of the proper executor is the appointment of a receiver).

Gall v. Fenwick.

[43 L. J. R., Ch. 178.]

A testator, seised of an estate partly freehold and partly leasehold, subject to a mortgage, specifically devised it. He created a mixed fund, consisting of personalty, proceeds of sale of some realty, and annuities to be raised out of the mortgaged estate and other estates, and thereout directed his debts to be paid.

Held, that there was no manifestation of a "contrary intention" within Locke King's Act and the 30 & 31 Vict. c. 69; but that as, by a slip of the pen in Locke King's Act, leaseholds were not affected by it, the leaseholds must be exonerated, and, the mortgage being apportioned between the freeholds and the leaseholds according to their respective values at the testator's decease, the part apportioned in respect of the leaseholds must be paid out of the mixed funds.

COMMENTS.

The M. R. in this case pointed out that the statute 30 & 31 Vict. c. 69 amounted to a legislative declaration that the Court had, in *Eno v. Tatam*, 4 Giff. 181, and other cases, put a wrong construction on the principal act, and reasoned wrongly upon it.

The omission to which attention is directed by the above case was (no doubt in consequence of the decision) rectified by the statute 40 & 41 Vict. c. 44, which extends the provisions of Locke King's Act to lands of whatever tenure, and to equitable charges and liens, including any lien for unpaid purchase-money. Testators and their advisers often do not sufficiently consider the effect of these acts, which ascribe an intention often not contemplated.

Bethel v. Abraham.

[43 L. J. R., Ch. 180; L. R., 17 Eq. 24.]

The effect of an administration decree is to suspend all discretionary powers vested by the will in trustees. The Court exercises all such powers instead, and, in so doing, abides by its ordinary rules.

For the Court has to protect all interests. After the administration suit ends, the suspension ceases, and the original discretions are re-vested, the trusts being thenceforward effectuated "out of Court."

COMMENT.

And see *In re Gadd, Eastwood v. Clarke* (*post*).

Forster v. Abraham.

[43 L. J. R., Ch. 199; L. R., 17 Eq. 351.]

Although the Court will not appoint a tenant for life to be a trustee, yet, if valid in other respects, such an appointment, made out of Court, is valid; and a sale made by the tenant for life, as trustee, under his power, is good, and he can give a good title.

The M. R. observes that it is the duty of the Court to decide whether a title is good or bad, the notion of a "doubtful" title (*i. e.*, too doubtful to be forced on a purchaser) being exploded by *Alexander v. Mills*, 40 L. J. R., Ch. 73; L. R., 6 Eq. 124.

The time for, and necessity of, a sale are not different as between the tenant for life and remainderman; and, in practice, the initiation of a sale generally proceeds from the tenant for life. In this case the power of sale was exercisable with consent of the tenant for life.

COMMENT.

In *Palmer v. Locke* (*post*, p. 403) some doubt was expressed as to whether *Alexander v. Mills* had the effect claimed for it by the M. R., and the Court of Appeal there held the title to be, and described it as, "too doubtful" to be forced on a purchaser. The "doubt" being whether the title is *marketable*, or only *safeholding*, the Court certainly solves that doubt.

Brown v. Rye.

[43 L. J. R., Ch. 228; L. R., 17 Eq. 343.]

A plaintiff suing in Chancery (or Chancery Division) for a sum within the County Court limit of jurisdiction in equity, will have his full costs as allowed in such Chancery Division. [This was also decided in *Richards v. Wicks*, Register of Judgments “(1868) R. 123;” in *Grandin v. Haines*, L. R., Weekly Notes, 1873, p. 12; and before Lords Justices, Weekly Notes, 1873, p. 92.]

Leech v. Schweder.

[43 L. J. R., Ch. 232; L. R., 9 Ch. 463.]

A judge of the Chancery Division will not view the site of a dispute. For—

1. He is not to be taken from important duties in Court and in Chambers.
2. As to a jury, the peculiarities of two or three would be balanced by the ordinary common sense of the majority. There would not be the same safeguard as to a judge.
3. The parties could not well appeal after a personal inspection by a judge.

[Of course, what is meant is that the appellate judges would say: “The judge below saw the spot and had advantages which we have not; and as he was, therefore, a better judge of fact, we will not interfere.” An appeal does not lie from a decision on matter of personal discretion, &c.]

Fothergill v. Rowland.

[43 L. J. R., Ch. 252; L. R., 17 Eq. 132.]

The defendant agreed with the plaintiff thus: “Sold R. F., Esq., the whole of the get of the No. 3 coal out of the New-bridge Colliery property for five years, the quantity not to be

less than at present delivered to his Taff Vale Works, unless the coal should fail, at 6s. a ton, payment as usual." He afterwards sold coal to others, and contracted to sell the colliery itself.

Held, that the agreement was for the sale of a chattel not of specific value, but a marketable commodity; that plaintiff's remedy was at law for damages, and not in equity for specific performance; and that the Court would not injoin to restrain a breach of a portion of an agreement the whole of which it could not enforce.

1. The words are "the get of coal," *i.e.* coals to be got, a severed chattel, and which could doubtless be got elsewhere—not coal of a peculiar kind.
2. If the coals are not delivered, there is no means of compelling their delivery.
3. If it is right to restrain, why not actively to compel? If you cannot do the one, you must not do the other.
4. In some cases of great "convenience," or "of sufficient importance," the Court might act.

COMMENTS.

See and consider *The Wolverhampton v. The London and North Western Railway Company*, 43 L. J. R., Ch. 131; L. R., 16 Eq. 433. The Court will look to the substance of the act to be performed, and not merely to the presence or absence of negative words.

In *Lumley v. Wagner*, 21 L. J. R., Ch. 898; 5 De G. & S. 485 (Lord St. Leonards), which is the leading authority on "injunction without specific performance," the rule is thus stated:—

"Where a contract contains agreements to do certain acts, and also to abstain from doing certain acts, the Court has jurisdiction to restrain the breach of the negative covenants, although there may be no jurisdiction to specifically perform the affirmative covenants; but in such cases the Court will decline to interfere where the jurisdiction cannot be beneficially exercised, or where its exercise would work injustice, as where the consideration for the negative covenant of one party is the positive covenant of another, and the affirmative covenant cannot be enforced."

In *Donnell v. Bennett*, L. R., 22 Ch. Div. 835; 52 L. J., Ch. 414, Fry, J., referring approvingly to the above case, says that if the contract as a whole is the subject of equitable jurisdiction, the modern tendency is to grant an injunction, whether the agreement does or does not contain a negative stipulation.

In re Goodwin's Trusts.

[43 L. J. R., Ch. 258 ; L. R., 17 Eq. 345.]

A gift by will to illegitimate children by a particular person is good as well as to a child born after as born before the date of the will, if such child has before the testator's death acquired the reputation of being such a child. The decision in *Occleston v. Fullalove*, L. R., 9 Ch. 147 ; 43 L. J. R., Ch. 297, amounts to this, although in that case the child who took (the offspring of a marriage with a deceased wife's sister) was *en ventre sa mère* at the date of the will.

[With regard to this decision V.-C. Hall observed, in *In re Ayles's Trusts*, 45 L. J. R., Ch. 223 ; L. R., 1 Ch. Div. 202, that the gifts there were by the reputed father ; and he did not think illegitimate children could take under a similar gift from the grandfather or reputed grandfather, or, in fact, from any one except the reputed parent.]

Jacobs v. Rylance.

[43 L. J. R., Ch. 230 ; 17 L. R., Eq. 341.]

A defaulting trustee must make good his default before he, or a mortgagee or transferee claiming under him, can take any interest in respect of a claim *quâ* one of the next-of-kin of a deceased *cestui que trust* or otherwise. The default in the character of trustee must first be satisfied.

Land v. Land.

[43 L. J. R., Ch. 311.]

In a suit instituted by beneficiaries for the administration of the estate of an intestate trader, where there are infants

interested, the Court has no jurisdiction to authorize the administrator to carry on the trade of an intestate.

Tinkler v. Hindmarsh, 2 Beav. 348, was a creditors' suit, and creditors can do what they like in such a case.

COMMENTS.

A testator's or intestate's trade must not be continued under any circumstances except (1) under power in a testator's will, or (2) authority from the Court. If the above authority be followed, it would appear that the Court will not generally grant leave to continue the trade where persons not *sui juris* are concerned, or unless it be asked by creditors. If beneficiaries, who are competent to do so, and are before the Court, consent, of course the case would be different.

The former cases are collected in *Hayes and Jarman on Wills*, 8th edition, p. 321.



Re Burnham National Schools.

[43 L. J. R., Ch. 340; L. R., 17 Eq. 241.]

Section 5 of the Charitable Trusts Act, 1853, does not oust the jurisdiction of the Charity Commissioners to appoint new trustees in contentious cases. That section simply gives them a discretion in the matter. The M. R. disapproved of Lord Romilly's *dictum* to the contrary in *Re Hackney Charities, re Nicholls*, 34 L. J. R., Ch. 169; 4 De G. J. & S. 588.

Where the Charity Commissioners have exercised the above power, the Court will only interfere in the case of a great miscarriage of justice.

It is doubtful whether the Charity Commissioners can remove statutory *ex officio* trustees—*e. g.* the rectors of parishes affected; but they can appoint enough new trustees to outvote such official trustees, and thus prevent a stagnation or a deadlock.



In re Mowlem.

[43 L. J. R., Ch. 353; L. R., 18 Eq. 9.]

Devise to first son of testator in tail male, and gift of residue of property to trustees. There was no son at testator's death, but one was born four months afterwards. The intermediate (four months') rents were held to belong to the trustees under the residuary clause.

[This is an exception to the rule that children conceived are to be considered for all purposes as born.]

Re The Tyne Chemical Company, Limited.

[43 L. J. R., Ch. 354.]

If a witness resident in Scotland, summoned under section 127 of the Companies Act, 1862, objects to be examined, the course is to move this Court that the witness be ordered to attend, at his own expense, before the sheriff of the county in Scotland to be examined. A person claiming to be a creditor may be so summoned, to ascertain whether there is a valid counter-claim against him.

In re The Hertfordshire Brewery Company, Limited.

[43 L. J. R., Ch. 358.]

A company carried on business for some time with about twenty shareholders. It was registered in 1872. In 1873 an order for winding up under supervision was made, and the voluntary liquidator was ordered to give security. List of contributories was settled, and the list included the seven subscribers of the memorandum of association. Afterwards it appeared that one of these was an infant.

A question was then raised as to whether the company was properly registered. The M. R. suggested that the

company might be wound up upon creditors' petition under section 199.

On that petition the M. R. made the order, appointed the voluntary liquidator official liquidator, ordered a new bond from him, but gave leave to the chief clerk to accept former sureties at same amounts, and to adopt all the proceedings under the first supervision order.



Crossley v. Maycock.

[43 L. J. R., Ch. 379; L. R., 18 Eq. 180.]

In answer to an offer by letter to buy land, the owners wrote: "We are in receipt of your note offering us £ for the plot of land situated, &c. . . . which offer we accept, and now hand you two copies of conditions of sale, which we have signed. We will thank you to sign same, and return one of the copies to us." Held, not an unqualified acceptance, and, therefore, that there was no contract.

The principle is this: "If there is a simple acceptance of an offer, and then a statement that the writer desires that the agreement should be put into more formal terms in accordance with the offer and acceptance, the mere reference to the intention or design of putting the agreement into more formal terms will not prevent this Court from giving performance of a final agreement which has been arrived at. If, however, the agreement is conditional on the acceptance of some further terms, specified or to be specified by the party himself or his solicitor, there is no final agreement." [This adopted in *Bonneirell v. Jenkins*, 47 L. J. R. (App.) 758; L. R., 8 Ch. Div. 70.]

Here the acceptance was subject to very special conditions which had not been before the intending purchaser.

COMMENTS.

Upon this class of case see and consider *Hussey v. Payne*, 47 L. J. R., Ch. 519; L. R., 8 Ch. Div. 670: on appeal, 47 L. J. R.,

Ch. 751: and in the House of Lords, 48 L. J. R. 846; L. R., 4 App. Cas. 311; and *Eadie v. Addison*, 52 L. J. R., Ch. 80 (Pearson, J.). The effect of the mere stipulation engrafted upon an acceptance of an offer—that the acceptance is to be subject to the title being approved by our solicitors—is held to mean only “subject to a good title being, in the opinion of the Court, made.”

So the contract to take a lease with “usual covenants” would mean such as the Court shall think usual. If the agreement is complete as to subject-matter, purchase-money, &c., and the only matters left open are those as to which the Court can see justice done, the contract will bind. In *Williams v. Brisco*, L. R., 22 Ch. D. 441, a decision that there can be no specific performance of an agreement to grant a lease to the nominee of a person until the nomination and acceptance by the nominee of the lease, the M. R. said, he did not consider that *Hussey v. Payne* laid down any new law.

Steward v. Nurse.

[43 L. J. R., Ch. 384.].

In order to ascertain whether the costs of an administration suit are to be taxed on the higher or the lower scale, the value of the estate at the time of the testator's death is the test.

In re Nether Stowey Vicarage.

[38 J. P. 340.]

Under the Land Tax Redemption Act (42 Geo. 3, c. 116, s. 100) the surplus moneys arising from the sale of glebe lands cannot be applied towards repairing or improving the vicarage house.

The M. R.: I am doubtful how far, having regard to *Re Dummer's Will*, 2 D. J. & S. 515, and *Brunskill v. Caird*, L. R., 16 Eq. 493, the cases of *Ex parte The Rector of Shipton*, 19 W. R. 549, and *In re Incumbent of Whitfield*, 1 J. & H. 610; and another case decided by Lord Romilly (*Ex parte Rector of Welbourn*, heard 18th April, 1868), can be considered as binding; but these decisions are under another act of parliament.

White v. Jameson.

[38 J. P. 694.]

The M. R. : If one man, acting on the revocable licence of another, commits a nuisance, the licensor who has an interest in the profits of the act complained of, is liable for the nuisance.

The occupier of land is liable for injuries caused by acts of persons brought by him upon the premises. The use of the land is confined by law to the occupier himself. *Littledale, J.*, correctly states the law in *Laugher v. Pointer*, 5 B. & C. 547.

Saull v. Browne.

[39 J. P. 181 (affirming the M. R.).]

The Court will not restrain proceedings in a criminal court, instituted by the plaintiff in the Chancery action against the same defendant, unless the object is identical. In *The Mayor of York v. Pilkington*, 2 Atk. 302, the object of both proceedings was identical.

Gainsford v. Dunn.

[43 L. J. R., Ch. 403; L. R., 17 Eq. 405.]

A testatrix was entitled to exercise a non-exclusive testamentary power amongst her brother and four sisters. She made a will, giving her brother and two sisters 5*l.* apiece, and to her other two sisters all the residue of her property of whatever kind, and over which she had any power of appointment.

Held, that the effect of giving the appointable property with the testatrix's own property was to make the legacies payable out of both rateably, and so to make the power well exercised.

The following is a summary of the judgment:—

1. The case illustrates the extreme technicality of our law.
2. Under the old law, a non-exclusive power must have been exercised by a gift of a substantial share to each object. The Court had to say what was a substantial share.
3. That inconvenience led to the statute 1 Will. 4, c. 46, by virtue of which there must still be an appointment of something to each, but that something may be exactly what the appointor pleases—*i. e.* a farthing will do.
4. It is argued here that, because nothing had been given to the brother and the other two sisters out of the appointed property, the appointment would fail altogether. But—
5. The gift is, no doubt, of 5*l.* first, as a common legacy. Had that been all, this legacy would have been payable only out of general personal estate. However, then she gives the residue of her property of whatever kind, including the residue of the appointable property.
6. The authorities show that, where a legacy is followed by a gift of the residue of real and personal estate, the word “residue” means that out of which, as a mixed fund, something has been before given.
7. The effect of that is to charge the legacies on that mixed fund. [The question has generally arisen when the personalty has failed; and it is said that the legacy is payable out of the real estate. In truth, however, it is payable out of both funds.]
8. Here, therefore, the three legacies of 5*l.* each are payable partly—*i. e.* at least as to a *fraction*—out of the testatrix’s own property and partly out of the appointable property. So the appointment is not illusory, and I can give effect to the will, and thus—
9. One technicality defeats another technicality, as often is the case, and the true intention prevails.

Lamb v. Cranfield.

[43 L. J. R., Ch. 408.]

There is no remedy in equity for money voluntarily paid under a mistake. If there be any remedy under the circumstances of the case, it is at law (Story, Eq. Jur. s. 151).

[Of course, since the Judicature Act, the distinction will be more serviceable as guiding the choice of the Common Law Division than on the principle.]

Re The Tahiti Cotton and Coffee Plantation Company (Limited).

[43 L. J. R., Ch. 425; L. R., 17 Eq. 273.]

The Court has no jurisdiction under section 35 of the Companies Act, 1862, to grant specific performance of an agreement to transfer shares, or to enforce against the company an equitable claim to be registered; but if there is a legal title, the Court will compel the company to enter the name, although the title is disputed by the person registered as holder.

If a pledgor of shares executes a transfer of them, leaving date and name of transferee in blank, the pledgee or his transferee may fill up the blanks. But, as a legal power to execute a deed must be conferred by deed, the effect of such an execution is only to confer an equitable interest on the transferee (*Hebblewhite v. M'Morine*, 9 L. J. R., Ex. 217; 9 M. & W. 200). In other words, a transfer executed in blank is void as a deed. But unless the articles require a deed, such a transfer will sufficiently operate in equity. In *Marino's Case*, 36 L. J. R., Ch. 468; L. R., 2 Ch. 596, the articles contained no provision as to the mode in which transfers were to be executed, and reference was then had to the custom of that company, which custom required a deed. Here there were clauses containing express regulations as to the mode of transfer, and no custom could interfere, and the

M. R. held that the cases were sufficiently distinct for decision of this without reference to *Marino's Case*.

The M. R. held that the words of the section did not enable him to give costs against the registered proprietor; but gave costs against the company, who sided with such registered owner, and did not remain neutral.

Paget v. Marquis of Anglesea.

[43 L. J. R., Ch. 437; L. R., 17 Eq. 283.]

A., a tenant for life, to secure a debt, granted, by deed to W., a rent-charge, with powers of distress and entry. By the same deed he granted a term of years, determinable on his death, to a trustee to secure the same rent-charge. A. died in the middle of a quarter. Two quarters were in arrear. W. had never entered. A.'s estate was insolvent. The rents had been paid to a separate account. Held, that sect. 2 of the Apportionment Act did not apply. The Act was not intended to apply to a mortgagee not in possession. W. was not entitled to a charge on the rents paid to the separate account, either for the apportioned rent-charge for the current quarter or for the arrears.

Re Ellis's Trusts.

[43 L. J. R., Ch. 444; L. R., 17 Eq. 409.]

A testatrix by will gave 500*l.* in Consols to A. B., a married woman, absolutely. By codicil she declared that all gifts, whether absolute or limited, made by her will to any female, should be for her separate use without power of anticipation. The fund was paid into Court.

Held, that the restraint applied to the Consols, and that A. B. could only have the income during coverture. There

is no distinction, as to this restraint, between capital and income.

The analogy of *Baggett v. Meux*, 15 L. J. R., Ch. 262; 1 Coll. 138; and *Tullett v. Armstrong*, 5 L. J. R., Ch. 303; 4 Myl. & Cr. 377, as to real estate, applied. [There was no prior distinct decision as to the *corpus* of personalty.]



Re The Poole Fire Brick Company.

[43 L. J. R., Ch. 447; L. R., 18 Eq. 542; affirmed on appeal, 44 L. J. R., Ch. 240; L. R., 10 Ch. 157.]

If an official liquidator refuses to take a summons to consider a claim made by a creditor, and the creditor brings an action and recovers judgment, the Court will only restrain the action on the creditor being allowed to prove for his judgment, costs at law, and costs of motion.



Barclay v. Messenger.

[43 L. J. R., Ch. 449.]

If time be originally of the essence of a contract, and it be extended, that extension does not operate as an absolute waiver of the condition making time of the essence of the contract, but only substitutes the extended time for the original time.

The opinion of Lord Romilly to the contrary, expressed in *Parker v. Thorold*, 16 Beav. 76, disapproved.



Richards v. Delbridge.

[43 L. J. R., Ch. 459.]

The lessee of a mill for a term of ninety-nine years, determinable on lives, and owner of the plant, machinery, and

stock in trade thereon, indorsed on the lease this memorandum: "This deed, and all thereto belonging, I give to A. from this time forth, with all the stock in trade;" and he signed the memorandum, and handed the deed to A.'s mother. After his death A. claimed the mill and appurtenances, on the ground that the memorandum amounted to a valid declaration of trust.

Held, that A.'s claim was bad; on the ground that words importing a present intention to give, cannot be held to amount to an intention to retain as trustee.

Milroy v. Lord, 31 L. J. R., Ch. 798; 4 De G. F. & J. 264, approved and followed.

Morgan v. Malleon, 39 L. J. R., Ch. 680 (Lord Romilly); L. R., 10 Eq. 475; and *Richardson v. Richardson*, 36 L. J. R., Ch. 653 (V.-C. Wood); L. R., 3 Eq. 686, disapproved.

A man may transfer his property, without value, in two ways: (a) He may do such acts as amount at law to a conveyance or assignment; or (b) he may make an equitable transfer—that is, may make a valid declaration of trust; may, in effect, say, "I undertake to hold this property for another." The law is thus stated by Lord Justice Turner in *Milroy v. Lord* (*ubi supra*): "If the settlement is intended to be effectuated by one of the modes, the Court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust."

The M. R. said that this contained the whole law on the subject.

COMMENTS.

The two authorities disapproved as above were also disapproved by V.-C. Bacon in *Warriner v. Rogers*, 42 L. J. R., Ch. 581; L. R., 16 Eq. 340.

The decision of V.-C. Malins in *Baddeley v. Baddeley*, 48 L. J. R., Ch. 36; L. R., 9 Ch. D. 113, is inconsistent with the above; as also is that of V.-C. Hall in *In re King's Estate*, *Sewell v. King*, 49 L. J. R., Ch. 73; L. R., 14 Ch. D. 179. It is

conceived that the views of the M. R., V.-C. Bacon, and L. J. Turner contain the correct doctrine. In *In re Breton*, L. R., 17 Ch. D. 416; 50 L. J., Ch. 369, V.-C. Hall followed *Richards v. Delbridge* (*sup.*), and disapproved *Baddeley v. Baddeley*.

Sale v. Lambert.

[43 L. J. R., Ch. 470; L. R., 18 Eq. 1.]

The particulars stated that the property was put up for sale by "the proprietor." No further description was given therein, or in the conditions. The auctioneer signed a memorandum, "that the vendor on his part should in all respects fulfil the conditions of sale mentioned in the said particulars."

Held, that the word "proprietor" was a sufficient description of the vendor (see *Hood v. Lord Barrington*, L. R., 6 Eq. 218).

Potter v. Duffield.

[43 L. J. R., Ch. 472; L. R., 18 Eq. 4.]

In this case there was nothing to identify the seller but the signature of the auctioneers, "on the part of the vendor." In one part of the particulars it was "vendor," and in another "vendors." The bill was filed against a person who denied that he was the vendor, and proved his case. Held, no contract.

"All that I decided in *Sale v. Lambert* was, that 'the proprietor' was a sufficient description of the vendor."

"The parties must be sufficiently described, so that their identity cannot fairly be disputed."

COMMENTS.

See also *Rossiter v. Miller* (*infra*), H. L. 48 L. J. R., Ch. 10; L. R., 3 App. Cas. 1124. The House of Lords affirmed the decision of the M. R. (with which the Court of Appeal had disagreed), that a description of the vendors as "the proprietors in possession" was sufficient. The description "a trustee selling under power of sale" was also held sufficient in *Catling v. King* (appellant), 46 L. J. R., Ch. 384; L. R., 5 Ch. Div. 660.

**Ystalyfera Iron Company v. Neath and Brecon
Railway Company.**

[43 L. J. R., Ch. 476.]

A certificate of two justices under sect. 17 of the Lands Clauses Consolidation Act, or of a police magistrate, under 2 & 3 Vict. c. 71, s. 14, that the capital of a company is all subscribed, is conclusive evidence, binding on all landowners with whom the company deal, unless fraud in obtaining it can be proved.

Sackville v. Smyth.

[43 L. J. R., Ch. 494; L. R., 17 Eq. 153.]

A testator's mansion house, and other lands, being subject to a mortgage, he devised same to trustees, upon trust, as to the mansion house, to permit his widow to reside in it for her life, and as to the residue upon trust for certain persons in tail. Power was given to the trustees to sell all, except the mansion house, and, out of the proceeds, to discharge "incumbrances." His residuary personal estate he gave to trustees upon trust to pay "debts" and legacies, and to pay the surplus, if any, to his brother; and declared that if the residuary personalty was not sufficient for payment of debts and legacies, the same should be charged on the real estate other than the mansion house.

Held, that the mansion house was not to be exonerated from the mortgage out of the personal estate.

The M. R. disagreed with *Brownson v. Laurance*, 37 L. J. R., Ch. 351; L. R., 6 Eq. 1, and with the principle there laid down, that "the mere fact of the testator having specifically devised part of the mortgaged estate, and left the other part to pass by the general residuary gift," showed an intention to exonerate.

COMMENT.

The M. R. has done very much to prevent refinements upon the legislative intention, as expressed in *Locke King's* and the

amending Acts (see his decisions in *Gall v. Fenwick* (*ante*); *Newmarch v. Storr*, L. R., 9 Ch. D. 12; 48 L. J. R., Ch. 28 (App.); and *Rossiter v. Rossiter*, 49 L. J. R., Ch. 36).

Howard v. Earl of Shrewsbury.

[43 L. J. R., Ch. 495; L. R., 17 Eq. 378.]

An infant may file a bill in equity to recover land under an equitable title, whether he has been in possession himself or not.

Crouther v. Crouther, 23 Beav. 305, disapproved.

At the hearing it appeared that the infant had a legal title; but the M. R. made a decree without requiring any amendment.

Pattison v. Gilford.

[43 L. J. R., Ch. 524; L. R., 18 Eq. 259.]

G., owner of a farm of 180 acres, which was subject to a right of shooting, which had been demised for a term to P., staked out a road across the farm, pulling down two hedges for the purpose, and put up the farm for sale by auction in thirteen lots, some of which were described as eligible for building purposes. The particulars mentioned the right of shooting, and stated that the sale was subject to such right. On bill to restrain the sale, held that, as it did not appear that the sale must inevitably result in an injury to the plaintiff's right, the injunction could not be granted.

For the notice of the existence of the sporting rights was notice that any purchaser would have to deal with the lessee of the shooting before he could build.

Before an injunction against a threatened act is granted, it must be shown that the act, if done, will be an inevitable violation of a right.

Lacy v. Hill (Crowley's Claim).

[43 L. J. R., Ch. 551 ; L. R., 18 Eq. 182.]

The liability of a principal to indemnify his agent is, in equity, extended to all liabilities contracted by the agent in the course of his employment.

Turner v. Buck.

[43 L. J. R., Ch. 583 ; L. R., 18 Eq. 301.]

If legacies are payable out of the proceeds of sale of real estate which becomes the subject of an administration suit, interest will be allowed from a year after testator's decease.

If there is an immediate charge of the legacies on the lands, and the proceeds are not required for the payment of the testator's debts, interest will be allowed as from the date of the death, as a penalty for the delay.

Warne v. Routledge.

[43 L. J. R., Ch. 604 ; L. R., 18 Eq. 497.]

A married woman agreed with publishers that they should publish her book at their expense and sell it at 1s. a copy, paying her 1d. a copy for every copy sold, reckoning thirteen as twelve. She afterwards gave notice to terminate this agreement, and agreed freshly with other publishers to bring out a revised edition. The first publishers sought to restrain this republication until the copies which they had printed were sold. Held, that they were not entitled to the relief sought.

The jurisdiction by injunction is founded upon contract only. There could not be specific performance. If she had contracted not to republish, the injunction might have gone ;

but no new term could be imported into the contract. This was really a partnership at will.

COMMENT.

In a case like this publishers should always take a contract not to republish, as, in the case of sale of goodwill of a business, a contract not to deal with the old customers should be taken (see *Ginesi v. Cooper*, and *Leggott v. Barrett*, *infra*).

Caballero v. Henty.

[43 L. J. R. 635, Ch. App. ; L. R., 9 Ch. 447.]

[This case is only reported on appeal, but it is an affirmation of a valuable decision by the M. R.]

If conditions only contain the words "subject to existing tenancies," and contain no reference to an unexpired lease for, say, eight years to another tenant, a purchaser will not be compelled to take the property either with or without abatement. Evidence as to whether the lease was, or was not, produced, and read in the auction room, was conflicting ; but the L. JJ. and the M. R. held that, if it was not mentioned in the contract, a purchaser should not be bound.

The observations and decision in *James v. Lichfield*, 39 L. J. R., Ch. 248 ; L. R., 9 Eq. 51, disapproved.

COMMENT.

In the above case the property was a public-house, and had been bought by brewers for occupation. But the principle would probably be held to apply as between vendor and purchaser, while the matter remained one of contract (*i. e.* on the application for specific performance), independently of these circumstances. For, in *James v. Lichfield*, the property consisted of ordinary houses and land. It was a misdescription not to disclose the lease. In many of the cases as to notice of a tenancy, the question has arisen after completion of the purchase, and then as between the purchaser and the tenant.

Honywood v. Honywood.

[43 L. J. R., Ch. 652; L. R., 18 Eq. 306.]

The question of what timber is, depends first on general law; secondly, on the special custom of a locality. By the general law of England, oak, ash, and elm are timber if of the age of twenty years and upwards, yet not so old as not to have as much useable wood in them as will make a good post.

Ordinarily speaking, a tenant for life, impeachable for waste, must not cut timber. That is the law except as to timber estates, which are estates cultivated merely for the produce of saleable timber, and where timber is cut periodically. The reason of the exception is that the felling of timber on such an estate is part of its cultivation, the timber being its annual fruit, so to speak, and going to the tenant for life, as such, when cut.

The tenant for life can cut all that is not timber, except (1) ornamental trees, (2) gerrons or stoles of underwood, (3) trees planted for the protection of banks, or (4) any tree likely to become timber when twenty years old, or (5) any growth which, if cut, will cause waste. Even a timber tree he may cut if necessary to preserve others.

The property in timber when cut is as follows: If the timber is timber properly so called, the property is, whether it be cut by the tenant for life or blown down by a storm, in the owner of the first vested estate of inheritance, unless he has colluded with the tenant for life.

There is an equitable exception where timber is decaying; and, in a suit properly instituted, to which both tenant for life and the owner of the first vested estate of inheritance are parties, an order is obtained to cut such timber. There the Court invests the proceeds, and makes them follow the interests in the estate. The principal sum ultimately goes to the owner of the first vested estate of inheritance. The same course is adopted where equitable waste is committed—*i. e.*, where ornamental trees, &c., are cut down.

As to trees not timber—*i. e.*, either from their nature or because not old enough or too old—the property is in the

tenant for life. Even if he acts wrongfully in the cutting, this is so at law. He may be liable to an action for waste. In equity, probably, in that case he would not be allowed to take; but the point has not been decided. If the trees are under twenty years of age, but cut to save others, the tenant for life is entitled to the proceeds.

COMMENTS.

In many of our counties there are special customs as to timber. For instance, in Yorkshire and Cumberland, birch is timber; in Bucks, beech, cherry, and aspen are timber; in Gloucestershire, beech is timber (*Lord Fitzhardinge v. Pritchett*, 36 L. J. R., M. C. 49; L. R., 2 Q. B. 135); in Hampshire, beech and willow are timber; and, in some places, whitethorn, holly, blackthorn, horse chesnut, lime, yews, crab, and hornbeam are timber. [The above is an example of the masterly, fearless, and exhaustive judgments of the M. R.]

An incumbent cannot cut timber except for repair of the church or chancel, or cut any wood except for the repair of gates, stiles, or fences on the glebe, or for necessary fuel in his house (*Prideaux's Churchw. Guide*, p. 164).

Nene Valley Drainage Commissioners v. Dunkley.

[41 J. P. 101 (Nov. 1876), affirming the M. R.]

The defendant agreed to purchase a wharf, described as abutting on a towing-path, and lately in the occupation of A. B. The contract did not refer to any plan, but at the time of signing the agreement a memorandum referring to the agreement for sale was written on a plan of the property, which showed that a strip of the wharf was to be taken off and added to the towing-path.

Held, that the plan was incorporated with the agreement, in a manner to satisfy the Statute of Frauds, the defendant's pleas of misdescription, deception, and surprise failing.

In re Poplar and Blackwall Free School.

[42 J. P. 678 (June 1, 1878).]

Where trustees of a charity are in doubt as to administration of the funds, their proper course is to apply to the

Charity Commissioners to settle a scheme. The 17th section of the Charitable Trusts Act does not prevent them from paying the trust moneys into Court; but if they do, they cannot afterwards petition for a scheme for administration of the trusts. The Attorney-General must then do this. The trustees, however, relieve themselves of all responsibility by paying into Court. Upon a transfer of charity funds to a School Board, care must be taken that such funds are not applied in aid of the rates. They should be applied towards the general advancement of learning, *e. g.*, the founding scholarships and exhibitions, not to the general benefit of the school.



In re The Albion Steel and Wire Co. (Limited).

[42 J. P. 279.]

There is not by sect. 10 of the Judicature Act, 1875, any priority given to local and other rates under a winding up of a company.

[Malins, V.-C., decided in the Regent United Service Stores, 42 J. P. 279, that the Queen's taxes were in the same position as parish rates.]

COMMENT.

In *In re Watson & Co.*, L. R., 23 Ch. D. 500; 52 L. J., Ch. 473, it was held by Kay, J., that to entitle a rating authority to payment in full of rates made subsequently to the winding up, the liquidator must have had actual beneficial occupation in respect of the period covered by the rate. If that is the case the Court allows payment under sect. 163.



Gravely v. Barnard.

[43 L. J. R., Ch. 659; L. R., 18 Eq. 518.]

To support a bond not to practise within a certain limit, any actual consideration, irrespectively of its *quantum*, is enough. This was (the M. R. observes) finally decided in *Hitchcock v. Coker*, 6 L. J. R., Exch. 266; 6 Ad. & El. 438. Of course the consideration must be legal and of some value. The Court may infer the consideration from the language of the bond.

Reuter's Telegram Company v. Byron.

[43 L. J. R., Ch. 661.]

The Court will always restrain a man from publishing or divulging that which has been communicated to him in confidence. But it will not restrain a man from making use of knowledge acquired during the relationship of principal and agent, after the termination of that relationship, in the absence of a contract, express or implied. As to the cyphers which were in question in this case, they were not confidentially communicated; there was no property in them; and a publication to the world would neither have injured nor benefited any one.

COMMENTS.

In *Morison v. Moat* (approved by the M. R), 20 L. J. R., Ch. 513; 21 L. J. R., Ch. 248, the law is thus stated:—

“Where a party who has a secret in trade employs persons under contract express or implied, or under duty express or implied, those persons cannot gain the knowledge of that secret, and then set it up against the employer.”

The injunction in that case was against a late partner who had acquired the secret surreptitiously, and from a third person, who was undoubtedly bound not to disclose it. It was a secret as to the manufacture of a medicine, and its constituent parts.

**Bellairs v. Bellairs.**

[43 L. J. R., Ch. 669; L. R., 18 Eq. 510.]

H. B., by his will, devised and bequeathed his residuary real and personal estate to his two sons, H. W. B. and C. B., in trust for sale and conversion, and for investment in various securities; and he directed his trustees to divide the annual income of the trust fund, after certain deductions, among his seven other children, during their lives, or until any of them should do any act whereby his or her share or shares might be forfeited, or vested in any other person, in specified shares, of which his two daughters, L. P. B., and M. N. S. B., were to have ten each; and he further directed that, after the

death of the survivor of his said seven children, the trust fund should be divisible between his two sons, H. W. B. and C. B., their respective executors, administrators, and assigns, in equal shares.

By a codicil to his will, "he did thereby declare that, on the marriage of either of his said daughters, the bequests of the said shares so given to them, and each of them, as afore-said, should absolutely cease and be void, and, in lieu and substitution thereof, he gave and bequeathed to such one of them as should have so married, four shares only of his said residuary estate" for her separate use. "And he gave and bequeathed to such one of his said daughters, so long as she should remain unmarried, thirteen of the shares in his said residuary estate;" but he directed that the same should be reduced to four shares only on her marriage for her separate use. "And he thereby directed that, on one of his said daughters being married, the three overplus shares should fall into and form part of his said residuary estate, and be divided as in his said will was mentioned."

L. P. B. married after the death of the testator.

Held, that the condition reducing her shares in case of marriage was void, and that she was, although married, entitled to the ten shares of the income during her life.

1. A general prohibition of marriage is void as a condition defeating a gift of purely personal estate.
2. The source whence this rule was derived was the Crown or civil law; and hence personal estate is subject to the rule, while land and charges on land follow the rule of the common law.
3. In this case the gift is neither land nor fixed personalty. It is a trust for sale of real estate and conversion of personal estate, and a gift of the income of the proceeds.
4. The testator uses the word "until," showing that he knew the difference between a condition and a limitation. The contention that it is a conditional limitation is scarcely arguable (*Lloyd v. Lloyd*, 21 L. J. R.,

- Ch. 596 ; 2 Sim. 255 ; *Morley v. Renoldson*, 12 L. J. R., Ch. 373 ; 1 Hare, 570). In the latter, it was held that a legacy, recognised by a codicil and made conditional on not marrying, was in restraint of marriage.
5. As to the proceeds of the sale of land, I hold the law to be the same as it is with regard to personal estate. When this Court took the rule from the civil law it modified it in cases of condition precedent, and conditions restraining marriage under a particular or given age, or without consent.
 6. A fund lying between the two classes of property, but found by this Court as money, is unquestionably to be treated as personalty. Mixed-funds [given together, and so given in one clause only] are governed by the rules of personalty.
 7. If necessary, I should hold that the proceeds of a valid trust for sale were also to be treated as personalty within the above rule (*Re Hart's Trusts*, 28 L. J. R., Ch. 7 ; 3 De G. & J. 195).
 8. The condition is void.

COMMENTS.

The adopted rule of law, simply stated, is, that a condition in restraint of marriage generally is, as to personal estate, void.

A "condition is a clause expressed or implied, providing or importing that an estate (or interest) shall be enlarged, diminished, defeated, or . . . suspended, in a given event" (Smith's "Executory Interests," s. 9).

A conditional limitation is a proviso by way of use or devise for the annihilation of an interest under a preceding limitation in a particular event which is unconnected with the original quantity of that interest, and which may not happen until after such interest has vested, and for the creation of a new interest in its stead in some other person (Ferne, 10). If the clause in question could have been shown to be a conditional limitation within the above definition, it would have been good.

As to real estate, the objection to a condition of the kind is altogether independent of the civil law, and is only founded on considerations of public policy. Thus, a condition in general restraint of marriage is void as to real estate because against that policy. But in almost every other modification it is good, and a testator's dispositions are unfettered. It was, until lately, doubtful whether a condition in restraint of the second marriage

of a man was equally valid with that in restraint of the second marriage of a woman. It was decided to be so by the Appeal Court in *Allen v. Jackson*, L. R., 1 Ch. D. 229; 45 L. J. R., Ch. App. 310. Any one may impose the condition—i.e. the power to do so is not confined to the husband or wife (*Newton v. Marsden*, 2 Jo. & H. 356).

The case of *Reynish v. Martin*, 3 Atk. 330, does not conflict with the above decision of the M. R., because the charge there was on the land in aid of the personalty, and there does not appear to have been the gift over which is necessary to render the condition to ask consent operative. Consequently, the legacy was allowed as a personal legacy, but not as a charge on land.

In *Williams v. Murrell*, L. R., 23 Ch. D. 360; 52 L. J., Ch. 631, Pearson, J., referring to the passage in the judgment in *Bellairs v. Bellairs*, *supra*, that "having a mixed fund, you are not to sever it into two and say it is valid as to so much as arises from realty, and invalid as to so much as arises from personalty, but to hold that the two funds are to be kept together, and that the rules as to personal estate are to apply," says that it shows that the M. R. "was thinking of a case in which really and truly there is a gift contained in one clause only." The question is whether in the particular will the whole property is mixed up in one mass. If so, the rule in *Genery v. Fitzgerald* (Jac. 468) applies, and the intermediate rents follow the rule as to intermediate income.



Wells v. Wells.

[43 L. J. R., Ch. 681; L. R., 18 Eq. 504.]

"Nephews" and "nieces" mean only those by blood, i.e., do not extend to the nephews and nieces of a husband or wife, although the testator or testatrix may have in his or her lifetime called the nephews and nieces of his or her husband his or her nephews and nieces.

When a word has a plain primary meaning, extrinsic evidence of another meaning is not admissible.

The fact that a husband's niece is in a previous gift in the will called a "niece" is not sufficient to enable the husband's nephews and nieces to take under a residuary gift to "all my nephews and nieces."

COMMENTS.

In *Merrill v. Morton*, L. R., 17 Ch. D. 382; 50 L. J. R., Ch. 249, V.-C. Malins says: "It is pernicious to extend the gift to the wife's

nephews and nieces, simply because a testator may have, in his will, referred to them as his nephews and nieces." The M. R. agreed with Lord Hatherley's judgment in *Smith v. Lidiard*, 3 Kay & J. 252, and disapproved, as did V.-C. Malins in the above case, the decision of the Court of Exchequer in *Grant v. Grant*, L. R., 5 C. P. 727; 39 L. J. R., Exch. 272.

On the other hand, where the testator has not, when he makes his will, or at his death, any of his own nephews or nieces, nor any possibility of having any, the wife's nephews and nieces are entitled under the description of the testator's nephews and nieces, and extrinsic evidence that the testator could not possibly mean them is not admissible. When you have got evidence of persons answering the description of legatees in the will, then you must stop all extrinsic evidence (*Sherratt v. Mountford*, L. R., 8 Ch. 928; 42 L. J. R., Ch. App. 688).

Steed v. Preece.

[43 L. J. R., Ch. 687; L. R., 18 Eq. 192.]

If real estate of an infant is ordered to be sold for payment of costs, or any other special purpose, and more is sold than is required, the surplus proceeds of sale are converted into personal estate, and, on the death of the infant, go to his personal representatives (*Jeremy v. Preston*, 13 Sim. 356; and *Cooke v. Dealey*, 22 Beav. 196, questioned). [See *post*, p. 108].

Mumford v. Stohwasser.

[43 L. J. R., Ch. 694; L. R., 18 Eq. 556.]

B., a builder, obtained from the landowner an agreement for a lease of a piece of land for ninety-nine years from September 29, 1868. He verbally agreed to build for M. a house on a portion of the land, and to grant an under-lease for the remainder of the term, save ten days, at 14*l.* a year. The house was completed, and possession given to M., who paid last instalment of his purchase-money on June 7, 1869. On September 24, 1869, M. became very ill, and a memorandum of agreement, thus, was drawn up and signed: "B. has this day agreed to grant a lease of a piece of land,

situate, &c., to M., of, &c., for a term of ninety-nine years, less ten days, from September 29, 1868, ground rent to commence March 25, 1869, according to lease being drawn up by solicitors of estate, with plan annexed.—B. M.”

On September 29, M. died. Under his will plaintiffs became entitled to the house. On December 9, 1869, B. obtained the actual lease from the lord (which had not until then been signed); but plaintiffs never had notice of granting of lease. In September, 1870, B., who was also a house agent, let the house for the plaintiffs to a tenant, who remained there, paying rent to the plaintiffs, until about September 29, 1871. Then the house became vacant. On October 2, 1871, B. deposited the lease by way of equitable mortgage with the defendant to secure 1,020*l.*, without notice of his sale to M. The house was then vacant, and so found by defendant. In March, 1872, the plaintiffs, through B., let the house again to a tenant, who paid his rent to them. On December 27, 1872 (this tenant being then in possession), B. executed a legal mortgage of the house to the defendant, who stated that B. had told him he had let part of the house, but that he thought he had meant a letting to a lodger.

The M. R.: True that the rent is not stated in the written memorandum, but possession had been taken and the rent paid at a fixed sum; and the covenants must have been in the under-lease the same as in the original lease. Therefore there is no uncertainty.

1. Then B. committed a fraud. The defendant advanced his money believing he had a good title, and without actual or constructive notice otherwise. The lease was deposited and the house was empty.
2. The mistake which the defendant made was in not taking the legal mortgage when he advanced his money, for meantime—before the mortgage was executed—the house was let, and constructive notice of the tenancy arose.
3. Not having done his duty in inquiring from whom the tenant held, he is fixed with notice that the person

assigning to him was a trustee for another person. He took an assignment of the legal estate from such a person. Such an assignment will not avail against a prior equity.

4. What would the effect have been if he had not had this notice? There has been a conflict of opinion; but mine is that, even without notice, he would not have acquired title. This would be the case of a trustee, knowing his character of trustee, assigning the legal estate to a person who did not know that he was a trustee, that person having acquired a prior equitable interest. I should hold that the second equity had not priority; in other words, that a trustee cannot, by committing a breach of trust, deprive of right his own *cestui que trust*.
5. The exact point in the present case was decided by Vice-Chancellor Wigram, in *Allen v. Knight*, 5 Hare, 272; 15 L. J. R., Ch. 430; affirmed 16 L. J. R., Ch. 370.
6. As M. was so careless I shall not allow him costs. Decree for lease in accordance with parol agreement.

—◆—

Armstrong v. Armstrong.

[43 L. J. R., Ch. 719; L. R., 18 Eq. 541.]

A power to raise a sum of money by mortgage includes a power to raise also, by the mortgage, the costs of effecting the mortgage.

COMMENT.

The maxim which naturally occurs to one as applicable is, "when the law gives anything to any one, it gives also all those things without which the thing itself would be unavailable" (5 Co. 47).

—◆—

Foxon v. Gascoigne.

[(On appeal from the M. R.) 43 L. J. R., Ch. App. 729; L. R.,
9 Ch. 654.]

Sect. 28 of 23 & 24 Vict. c. 127, enabling a solicitor to obtain a charge on property recovered or preserved for a

client, does not apply to a suit which can only relate to an easement. The action was one in which, in substance, an interim injunction upon a defendant not to build any higher or pull down the buildings was obtained.

Mellish, L. J.: "The M. R. gave several reasons for his judgment. One of them—and it is the ground upon which our judgment will be based—is that it was not a suit to recover *property*. If the plaintiff succeeded, all that can be said to be recovered or preserved is the right to the lights. How can a charge be made on that? None can be made on an *incident to property*."

Marzials v. Gibbons.

[43 L. J. R., Ch. 774 (on appeal from the M. R.).]

A committee of seven persons, on behalf of a religious body, compiled and registered under 54 Geo. 3, c. 156, as their property, a hymn-book. Although so registered, it was published by, and sold for the benefit of, the religious body. No minute of consent had been registered under 5 & 6 Vict. c. 45.

The real and sole owner was not the author, nor had the author given the copyright for natural love and affection. The Act is not in that case to apply unless the author, for his own benefit, shall, before the expiration of the existing copyright, have entered into an agreement with the then owner.

The M. R. made the right order, refusing to restrain the publication.

Aynsley v. Glover.

[43 L. J. R., Ch. 777; L. R., 18 Eq. 544; on appeal affirmed, 44 L. J. R., Ch. App. 523; L. R., 10 Ch. 283.]

The fact that an owner of ancient lights has enlarged his windows does not disentitle him to an injunction to protect the lights, *quoad* the windows as they were when the right was acquired.

It does not signify that the plaintiffs are for the time being using their premises for a purpose not requiring light and air (*Jackson v. Duke of Newcastle*, L. R., 1 Ch. 295, disapproved).

The plaintiff is entitled to an injunction, and not merely to damages, if he files his bill to restrain the interference with his lights before the building is commenced or completed, unless the injury is trifling, and Cairns's Act ought to be applied. That Act was passed to prevent a plaintiff from getting a very large sum from a defendant because the plaintiff had the legal right to an injunction for other than a material and substantial damage.

COMMENTS.

If a building which is entitled to ancient lights is pulled down, and so the right is suspended, and an adjoining owner proceeds to put up a building which would interfere with the lights of any new building on the old site, the Court will grant an injunction against such interference, if satisfied that it is intended to restore the building which had acquired the rights. In cases of interference with lights, the angle of 45 degrees is only used as a test, if there is no other satisfactory means of ascertaining the fact as to interference or otherwise. There is no rule of law providing for such a test (*Ecclesiastical Commissioners v. Kino*, 49 L. J. R., Ch. App. 529; L. R., 14 Ch. Div. 213). If the buildings entitled to ancient lights are pulled down and a large single building of a different character is built, and there is no reliable evidence as to the position of the windows in the old building, the easement is gone (*Fowlers v. Walker*, 49 L. J. R., Ch. 598). See *Hackett v. Baiss*, *post*.

Goodson v. Richardson.

[43 L. J. R., Ch. App. 790 (being in affirmation of a decision of the Master of the Rolls).]

The defendant wanted to supply his houses with water of his own. Having obtained the permission of the highway board to break the surface of a road, but being informed that such permission was subject to the rights of private owners, he laid pipes along the highway, which abutted on a piece of land, seventy-four yards whereof were owned in fee by the plaintiff, who objected. The defendant threatened also to complete waterworks of his own, and to use the pipes for his

own profit. A mandatory injunction was granted against the defendant. The works were completed before the filing of the bill, but were so quickly done (in about two weeks) that the plaintiff was held not to have acquiesced or delayed. The title of plaintiff was not disputed; and, where this is so, the Court does not require a prior action at law for the trespass to be brought.

There was an additional reason for holding the above remedy to be applicable, because it was a highway; and, if plaintiff had tried to remove the pipes, he might have been liable to proceedings from the highway board. If possession is originally legal, but liable to be displaced by ejectment, no injunction would be granted, but the parties would be left to their legal remedies.

That is the distinction between *Deere v. Guest*, 1 Myl. & Cr. 516; 6 L. J. R., Ch. 69, and *Bowes v. Law*, L. R., 9 Eq. 636, 39 L. J. R., Ch. 483, and the present case.

Jervis v. Wolferstan.

[43 L. J. R., Ch. 809; L. R. 18 Eq. 18.]

When a trust is accepted at the request of a *cestui que trust*, and duly performed, the *cestui que trust* is personally liable to indemnify the trustee against all losses accruing in the course of such due performance.

If the loss occurs after the death of the *cestui que trust*, the trustee stands as a creditor against the estate of the *cestui que trust*, and, as such, can compel legatees to whom legacies have been paid to refund to recoup him. If an executor has notice of a contingent liability, and yet distributes the estate, he may still, if the liability accrues, compel legatees to refund to meet that liability.

An executor requiring a legatee to refund, however, can only obtain from that legatee the capital sum paid, and not any intermediate interest—*i. e.* no interest on the amount which has been in the legatee's hands.

Strong v. Bird.

[43 L. J. R., Ch. 814; L. R., 18 Eq. 315.]

A. borrowed 1,100*l.* from his stepmother, who was residing with him, under an agreement that the debt should be paid by instalments of 100*l.* deducted from each quarterly payment for her board. After two deductions she refused to make any more, and said she would forgive the debt and pay in full for her board. She was in good circumstances. She lived four years more, and paid sixteen sums of 212*l.* 10*s.* a quarter. There were memoranda in her handwriting confirming the statements as to her intention to forgive the debt. She afterwards appointed A. sole executor of her will, but her will contained no disposition of her residuary estate.

Held, that the debt was validly released at law by the appointment as executor, and, in equity, on the merits, her intention having been to that effect; and also on the ground that her continued full payments for her board had actually completed the gift. The property had changed ownership.

Astley v. Earl of Essex.

[43 L. J. R., Ch. 817; L. R., 18 Eq. 290.]

An estate was settled on W. C. for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of W. C. successively in tail male, with remainder to other persons for life, remainder to their sons in tail in like manner. There was the usual name and arms clause, providing that, in case any person should fail to comply with it for twelve calendar months after becoming entitled in possession, the estate should go over as if he were dead.

T. G. C. entered into possession as tenant in tail, but did not comply with the above clause. He remained in possession for more than twenty years after he had forfeited the estate. At T. G. C.'s death the next remainderman (W. A. C.) was in India, and was ignorant of the condition, and did not comply with it.

Judgment.—The remainderman has a right, at the termination of the tenancy for life, to enter. The true way of reading the Statute of Limitations (3 & 4 Will. 4, c. 27, ss. 3, 4) is, that the words “forfeiture” and “breach of condition” are to be read in their largest sense, and to apply whether the forfeiture arises under a conditional limitation or is a true forfeiture at law. The Statute of Limitations, therefore, cannot apply. If the forfeiture did not apply to T. G. C., then, on his death, as he did not bar the entail, and died without issue, of course the next remainderman would be entitled to possession. If it did apply, the meaning of sect. 4 is that, as the title of the remainderman accrued by forfeiture or breach of condition, the words in the section include every case of forfeiture or breach of condition—whether operating by acceleration of another estate under a conditional limitation, or whether the effect of the forfeiture was merely to give a right to the heir to re-enter under the common law rule. If this was not so considered, what might follow—*e. g.*, in the case of forfeiture by reason of the tenant for life not residing for six months of every year at the mansion house? If sect. 4 did not apply, a man who broke the condition and lived twenty years afterwards might claim the fee. This would astonish the remainderman.

Then the clause applies to a tenant in tail—to W. A. C. Ignorance of the condition does not protect him (*Porter v. Fry*, 1 Vent. 199; *Re Hodges's Trusts*, L. R., 15 Eq. 92; 42 L. J. R., Ch. 452).



Jones v. Lloyd.

[43 L. J. R., Ch. 826; L. R., 18 Eq. 265.]

The next friend of a partner incurably insane, although not so found on inquisition, may sue for a dissolution of the partnership. The equity to have a dissolution is not confined to the other partner (see, also, *Fisher v. Melles*, L. R., 18 Eq. 268, n.).

Cotton v. Gillard.

[44 L. J. R., Ch. 90.]

A trade-mark cannot exist in gross—*i. e.*, apart from the invention or the article.

Re Poole Fire Brick, &c. Co. (Hartley's Case).

[44 L. J. R., Ch. 95; affirmed, 44 L. J. R., Ch. 240; L. R., 18 Eq. 542; and L. R., 10 Ch. 157.]

If, in pursuance of an agreement to allot fully paid up shares, the shares have been allotted before filing of the agreement with the registrar of joint stock companies, the company may, without any application to the Court, cancel the shares and issue new ones. The company may set a mistake right without coming to the Court.

Re Barned's Banking Co., *Ex parte* The Joint Stock Discount Co. (Limited).

[44 L. J. R., Ch. 97; affirmed on appeal, 44 L. J. R., Ch. 494; L. R., 10 Ch. 198.]

Where, under the doctrine of *Ex parte Waring* (19 Ves. 345), securities given as between drawer and acceptor, or indorser of bills, to assure payment of such bills, are realised and distributed amongst the several holders, such realisation and distribution are to be considered as effected when the bills become due; and all questions of proof are referred to that period, whether the administration be in Bankruptcy or Chancery.

Re The Agricultural Cattle Insurance Co.

[On affirming appeal, 44 L. J. R., Ch. App. 108; L. R., 10 Ch. 1.]

An insurance company, incorporated with unlimited liability, under 7 & 8 Vict. c. 110, granted policies containing

the following clause: "The funds, securities, and property of the company at the time of enforcing any claim under this agreement remaining unapplied and undisposed of, and inapplicable to prior claims, shall alone be liable to answer and make good all claims and demands upon the company." The company was wound up in 1861, and payment of amounts unpaid on shares was enforced by calls. The fund so obtained was applied *pro ratâ* in payment of claims of policy holders and general creditors of the company.

The M. R. ordered that such a proportion of the fund so obtained as was standing to the credit of the managers as the amounts due to the policy holders bore to the general debts of the company, should be apportioned amongst the policy holders, and that the costs should be paid out of money to be obtained by further calls on shareholders. This was affirmed on appeal.

The funds to which the contract points must be kept entirely for policy holders.

The Workington Local Board v. The Cockermouth Local Board.

[44 L. J. R., Ch. 118; L. R., 18 Eq. 172.]

Where a public body are proceeding to break a statutory provision, an injunction against such a course is as of right, and evidence that no one will be injured by the breach is useless (see *The Attorney-General v. The Leeds Corporation*, L. R., 5 Ch. 583; 39 L. J. R., Ch. 254, 711; and *The Attorney-General v. The Wolverhampton Rail. Co.*, 2 W. R. 330).

The Commissioners of Sewers of the City of London v. Glasse.

[44 L. J. R., Ch. 129; L. R., 18 Eq. 134.]

Judgment.—The owners and occupiers of land within this Epping Forest, claim right of common appurtenant for com-

monable beasts, levant and couchant, upon their lands over the wastes of the forest, *i. e.* over land which was 6,000 acres, and is now about 4,000 acres, there having been many inclosures. It is claimed as ordinary common appurtenant, limited to "neat beasts" and horses, and subject to the forestal custom that during the fence month of the year no commoning is allowed. Such a claim is to be proved: (a) by calling persons who can prove that for sixty years and upwards the right has been exercised; (b) by proving records of ancient claims.

The defendants say the common claimed is manorial, and that they, as lords, had a right to inclose the whole or the greater part of the common. Then they say they can defeat the right, claimed by prescription, by showing the origin of it to be inconsistent with present user. That is sound law, but the case of defendants fails.

Then it was said this may be a common appurtenant, not in the ordinary sense, but such a common with a common of vicinage over the wastes of the forest.

In order to have common of vicinage you must have two vills, or lordships, or manors, with separate commons adjoining, and the beasts must always be turned out in the commoner's own manor. Here there was no parish common. Parts of the waste are in different parishes, and the beasts were turned out on the whole. Therefore, the common must be the ordinary common appurtenant direct, and is, on the evidence, established.



Hasluck v. Pedley.

[44 L. J. R., Ch. 143; L. R., 19 Eq. 271.]

The Apportionment Act, 1870 (33 & 34 Vict. c. 35), applies both to a will made before and republished after it, and to a specific devise of lands, and generally as between the real and personal representatives.

In re Maclean's Trusts.

[44 L. J. R., Ch. 145; L. R., 19 Eq. 275.]

The exemption from succession duty provided for by sect. 17 of the Succession Duty Act (16 & 17 Vict. c. 51) applies to trustees of an assurance company, being assignees of an assured person; and, therefore, no succession duty is payable as between the subscriber and them.

Salvin v. The North Brancepeth Coal Company.

[(Affirming the Master of the Rolls) 44 L. J. R., Ch. 149, Ch. App.; L. R., 9 Ch. Div. 705.]

Where a colliery or other work is being carried on in the usual manner, so far as appears on the face of things, a plaintiff who seeks to interfere with it by injunction on the ground that it is a nuisance, must show actual and substantial or visible damage. He should first call ordinary witnesses. Scientific evidence should only be to explain the cause of the damage. The Court will not in such a case send an expert to report, as that would amount to a delegation of judgment; nor will it direct an issue where the state of things since institution of the suit may have altered.

In re The Traders North Staffordshire Carrying Co. (Limited), Ex parte The North Staffordshire Railway Co.

[44 L. J. R., Ch. 172; L. R., 19 Eq. 60.]

Section 163 of the Companies Act, 1862 (25 & 26 Vict. c. 89), is as follows: "When any company is being wound up by the Court, or subject to the supervision of the Court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company, after the commencement of the winding-up, shall be void to all intents."

The decision in *In re The Lundy Granite Company, Ex parte Heaven*, L. R., 6 Ch. 462; 40 L. J. R., Ch. 588, was only that the section did not apply where the distress is against a

tenant other than a company, although the company's goods may be taken under the distress. Lord Justice Turner, in *In re The Exhall Mining Company*, 33 L. J. R., Ch. 595, thought the section only applied to cases where leave had not been given to enforce the distress under sect. 87. The reason of Lord Justice Knight-Bruce in the case was a mistake; for the words are "after the commencement of the winding-up," not "after the winding-up order." The meaning of the Act is to prevent preferential claims after the winding-up.

COMMENTS.

The decision in *The Lundy Granite Company's Case* was followed in *In re The Regent United Service Stores, Ex parte Burke* (App.), 47 L. J. R., Ch. 677; L. R., 8 Ch. Div. 616. The question is whether the landlord is proceeding as creditor of the company. Unless he is, he cannot be restrained from his distress. In the last case the company were in occupation by arrangement with the actual lessee; but no assignment or underlease had been executed so as to put them in the position of legal tenants. The whole of the cases are revised in *In re Oak Pits Colliery Company*, L. R., 21 Ch. D. 322; 51 L. J. R., Ch. (App.) 768. As to rent accruing after the commencement of the winding-up, if the liquidator uses the property for carrying on the company's business, or keeps the property in order to sell it or otherwise deal with it, the landlord will, on application, under sect. 87, be allowed to distrain for or be ordered to receive in full such rent: but if possession has been kept by mutual arrangement, and for the benefit of the landlord as well as of the company, this will not be allowed, unless the liquidator has expressly agreed to pay the rent. Neither will the rent be allowed if the liquidator has been simply passive. The Judicature Act does not by implication alter the landlord's position by importing the Bankruptcy Act provisions in case of winding-up by the Court. (*Moor v. Anglo-Italian Bank*, L. R., 10 Ch. D. 681).

As to rates made after the winding-up, see *ante* p. 31.

Wells v. Kilpin.

[44 L. J. R., Ch. 184; L. R., 18 Eq. 298.]

An *elegit* judgment creditor to whom the sheriff has returned "nil," is entitled to a decree for sale and a receiver, subject, where there are prior incumbrances, to these incumbrances. He is not entitled to a declaration that he has a charge, or to a decree for foreclosure. [See *post*, pp. 233, 364.]

Finnegan v. James.

[44 L. J. R., Ch. 185; L. R., 19 Eq. 73.]

The equity practice in patent cases ought to conform, as far as possible, to that at law, as established by 15 & 16 Vict. c. 83, s. 41. The plaintiff must deliver particulars of breaches alleged, and, if a defendant then alleges prior user, the plaintiff may have counter-particulars of such alleged prior user.

COMMENT.

As regards particulars of objections, they must be complete in detail. (See *Flower v. Lloyd*, L. R., 6 Ch. Div. 297; and the order will now follow 46 & 47 Vict. c. 57, s. 29.)

Carlyon v. Truscott.

[44 L. J. R., Ch. 186; L. R., 20 Eq. 348.]

The gift in this case was of real and personal estate upon trust to pay debts, and then, if that was insufficient to pay them, to pay out of the real estate,—only a trust affecting the real estate if the personal estate was deficient. It did not prove deficient. As regards the particular estate in question, it was given to a lady for life, and after her death to sell and divide the proceeds. The lady was still living. The doctrine in *Forbes v. Peacock*, 13 L. J. R., Ch. 46; 12 Sim. 528, is only that, where there is a power to sell for the payment of debts and legacies, there is an implied power to give receipts. The case is no authority for the contention that there is also in such a case an implied power of sale.

COMMENT.

The will was, in this case, prior to the statutes 22 & 23 Vict. c. 85, and 23 & 24 Vict. c. 145, which, of course, supply the above power. Ultimately a title was made for the willing purchaser under the Leases and Sales of Settled Estates Act (19 & 20 Vict. c. 120), upon the authority of *In re The Duchess of Cleveland's Settled Estates*, L. R., W. N., July 11, 1874, and *In re Morgan's Settled Estates*, L. R., 9 Eq. 587.

Lowther v. Bentinck.

[44 L. J. R., Ch. 197; L. R., 19 Eq. 167.]

A legacy was bequeathed to trustees upon trust to pay the income to F. L. for life, and after his death for such trusts as said F. L. should appoint, and, in default of appointment, in trust for F. L.'s children. The testator declared that it should be lawful for the trustees to raise any part of the trust money, not exceeding one moiety, and to pay and apply the same "in or towards the preferment or advancement of the said F. L., or otherwise, for his benefit," in such manner as the said trustees "in their discretion should think fit."

F. L. was thirty at the date of the will. After testator's death he borrowed money on security of his life interest in the fund, and then applied to his trustees to pay off his debts thus incurred.

Held, that they might do so.

The M. R. observed that his rule was that laid down in *Grey v. Pearson*, 26 L. J. R., Ch. 473; 6 H. L. Cas. 61, to construe documents according to their literal import, unless there was ground for any other construction in the subject or the context. The matter is left to the discretion of the trustees. It is said I must read the words "or otherwise" as meaning things *ejusdem generis* as "preferment and advancement." I do not know what the same kind is, because no same kind exists.

Coates v. Legard.

[44 L. J. R., Ch. 201; L. R., 19 Eq. 56.]

In an administration action, all parties who are interested in taking the account of the personal estate are proper parties. Where all the plaintiffs have a common interest in the whole subject-matter of the action, defendants need not be in-

interested in all such subject-matter (*Campbell v. Mackay*, 6 L. J. R., Ch. 73, and 1 Myl. & Cr. 603, approved). Distinct subjects are not to be mixed up where it is inconvenient to do so, but that is a matter of discretion (*Pointon v. Pointon*, 40 L. J. R., Ch. 609 ; L. R., 12 Eq. 547, approved also).



Lacey v. Hill ; Leney v. Hill.

[44 L. J. R., Ch. 215 ; L. R., 19 Eq. 346.]

If a man, by his will, gives all his real estate upon trusts for sale and conversion, this, by sect. 4 of the Dower Act (3 & 4 Will. IV. c. 105), excludes dower. The testator has thereby "absolutely disposed of" his lands.

The M. R. dissented from some observations of his predecessor in *Rowland v. Cuthbertson*, L. R., 8 Eq. 466, which were immaterial to the decision there, because there was there a gift which clearly brought the case within sect. 9. He said that, to bring the case within sect. 4, "the testator must point out the land specifically, or designate it in some way." That is a mistake. A gift of "all my real estate" passes effectually all lands over which the testator has testamentary power. There is no more need for specific description in sect. 4 than in sect. 9. The case is within sect. 9 also, for the widow has an interest in the proceeds of the land to be sold. There is an interest, in equity, in the land itself, before sale, under this provision.

As to the copyhold question : Under the old law (before the Act of Geo. III.) a surrender to the use of the will, followed by the devise, was necessary. After the Act of Geo. III. the devise took effect as if there had been a surrender, and the widow did not take freebench. Then, sect. 3 of the Wills Act confers the power of devising copyhold estates as if there had been a surrender, or as if there had been a custom, &c.

It breaks in upon the customary law of copyholds for the purpose of giving an unlimited power of devise. The same effect is to be given to a devise of copyhold under the new law as under the old law; consequently a devise prevents the title to freebench arising.

COMMENT.

Every devise of land, whether in form general or residuary, is to all intents and purposes now "specific." Thus, devised estates mentioned specifically and by name, and so devised, are liable, equally with estates comprised in a residuary devise, to pay debts which the general personalty is insufficient to satisfy (*Lancefield v. Iggulden*, 44 L. J. R., Ch. App. 203; L. R., 10 Ch. 136; and *Hensman v. Fryer*, 37 L. J. R., Ch. 97; L. R., 3 Ch. 420).



In re **The Stranton Iron and Steel Co. (Limited),**
Ex parte **Barnett.**

[44 L. J. R., Ch. 233; L. R., 19 Eq. 449.]

As against calls due on shares before the winding-up, a shareholder cannot set-off a debt due from the company to him.

If there had been no winding-up, a set-off would have been allowed. But sect. 38 of the Companies Act provides that, in case of a winding-up, every contributory is to pay sufficient to meet the debts, &c., with the qualification of the limitation of liability to a certain extent (to be defined) per share. Sect. 101 does not overthrow sect. 38. It does not take away any existing rights. It says that, in the case of an unlimited company, the Court may (not shall) allow a set-off. The real reason why no set-off can be allowed arises from the language of sect. 38, not from that of sect. 101.

No weight can be given to the shareholder's uncorroborated and generalized statement (without giving time, place, or method of supposed arrangement) that there was an agreement for a set-off. Moreover, there is no company after the

winding-up, and the liquidator is not to be bound by such an assertion.

Calisher's Case, 37 L. J. R., Ch. 208 ; L. R., 5 Eq. 214, approved, but not as to reasons for the decision.

COMMENT.

See also the M. R.'s decision in *In re Whitehouse & Co. (infra)*, 47 L. J. R., Ch. 801 ; L. R., 9 Ch. D. 595.

Bush v. Trowbridge Water Company.

[44 L. J. R., Ch. 235 ; L. R., 19 Eq. 291 (affirmed on appeal, 44 L. J. R., Ch. 645 ; L. R., 10 Ch. Div. 459).]

If the water in a stream is appreciably affected by a diversion thereof by a company subject to the provisions of the Lands Clauses Act (sects. 84, 85), such diversion is ground for compensation, pursuant to sect. 68, but not for compulsory purchase under sects. 84 and 85.

If property is interfered with, it must be purchased as a whole. But if diversion of water were thus treated, every riparian owner and occupier could compel the purchase of their portion of the stream.

Moreover, it was decided in *Eagle v. The Charing Cross Rail. Co.*, 36 L. J. R., C. P. 297 ; L. R., 2 C. P. 638, that an easement is a subject for compensation under sect. 68.

Plimpton v. Malcolmson.

[44 L. J. R., Ch. 257 ; L. R., 20 Eq. 37.]

Although a patent may have been used for eight years, yet, unless there has been active user by way of infringement, an injunction will not be granted on interlocutory application.

V.-C. Kindersley's rule to avoid, as far as possible, expressing upon interlocutory application any opinion on the merits, approved.

Hoskins v. Holland.

[44 L. J. R., Ch. 273.]

The fact that a person is only an assignee in equity of a legal demand is no ground for saying that the forum should be a Court of Equity [or now the Chancery Division].

**Howard v. The Bank of England.**

[44 L. J. R., Ch. 329; L. R., 19 Eq. 295.]

In this case the M. R. held that the Married Women's Property Act, 1870, gave no fresh power of contract to a married woman. It did make certain property her separate property, subject to the incidents of an ordinary separate use, and it superadded certain defined remedies at law for small sums; but, beyond that, made no alteration in the *status* of married women. The M. R. also doubted whether, under sect. 3, trust property was included, and held that the Act did not apply as to stock until the stock had been placed in the sole name of the married woman for her separate use.

COMMENTS.

Of course the Married Women's Property Act, 1882, as to cases coming within it, supplies the above rights and powers. The Act works such a revolution in the relative position of man and wife, and the growth of technicalities affecting that position both as to the law relating to real and personal estate has been so gradual, that the Act is sure to cause much litigation. The maxim that man and wife are to be deemed in law one person is reversed. Thus, for instance, under the law as it stood, if A. and B., both women, or A. a woman and B. a man, held personally as joint tenants, and A. married, the joint tenancy was severed by the act of marriage. Apparently that would not be so as to a marriage since the Act. (See *Baillie v. Traherne*, L. R., 17 Ch. Div. 388; 50 L. J. R., Ch. 295; and *Bracebridge v. Cook*, Plowd. 416; Co. Lit. 1856, and authorities there cited.)

Again, is not the effect of the Act to destroy what would have been the "tenancy by entireties," with its technical results?

Sect. 1 of the Act strikes its key-note ; the married woman is to be "as if she were a *feme sole*." It is a kind of statutory separate property, irrespectively of the equitable separate use which the Act creates. I propose to offer some further observations under the head of *Cooper v. Macdonald* (*infra*).

Since the above was written, Chitty, J., has decided that the effect of a gift to a husband and wife and another person, even in a will made before the Act, is now to divide the property into thirds. (See *Mander v. Harris*, 52 L. J. R., Ch. 680. As regards wills made before the Act, there is the undoubted difficulty arising from the rule that "ignorance of the law does not excuse," or "every one is presumed to know the law." If the matter had been one of contract, "people in general must always be considered as contracting with reference to the law as existing at the time of the contract," although there is nothing "to prevent parties . . . from binding themselves by apt words by a contract as to any future state of the law" (Maule, J., in *The Mayor of Berwick v. Oswald*, 23 L. J. R., Q. B. (Ex. Ch.) 324; 3 El. & B. 665). Thus, if a man covenants to do a thing, and an Act comes after and makes the act unlawful, the statute repeals the covenant (*Baily v. De Crespigny*, L. R., 4 Q. B. 180; 38 L. J. R., Q. B. 98). In *Hasluck v. Pedley* (*ante*, p. 46), the will was made before the Apportionment Act, but republished after it, and, of course, the testator died after it. The M. R. there observed : "It is very well to say that the testator, who made his will and died after the Act, relied on the state of the law when he made his will; but it is equally well to say that he must have meant it to take effect under the new law." In *Jones v. Ogle* (42 L. J. R., Ch. App. 334; L. R., 8 Ch. D. 192), the Lord Chancellor observes : "I should have great difficulty in saying that the Act was intended to alter or had the effect of altering the construction of a will made before the Act was passed. If the will had been made after the passing of the Act, I could follow the argument that the testator makes his will with the Act in his mind, and the expressions he uses are to be construed with reference to the Act; but the construction of the words of a specific gift must, in my opinion, be taken generally according to the meaning of the words at the time when the will was made."

The above authorities would appear to militate against the application of the Act to a will made before the Act now under consideration.

As to cases coming within sect. 5 of the 1882 Act, it would appear that the principle of *Castle v. Wilkinson* (L. R., 5 Ch. Div. 534; 39 L. J. R., Ch. 843) will no longer apply. Formerly, the married woman could not bind herself by contract or otherwise than by acknowledged deed.



In re The Teme Valley Rail. Co. (Forbes's Case).

[44 L. J. R., Ch. 356 ; L. R., 19 Eq. 353.]

This case is a simple approval of *Kincaid's Case*, *In re The North Kent Railway Extension Co.*, 40 L. J. R., Ch. 19 ; L. R., 11 Eq. 192.

A promoter, signing a petition for a private Act (incorporating the Companies Act), and subscribing to the undertaking, and bound as such to take fifty shares at least, is liable as a contributory to the extent of fifty shares, although the shares may never have been allotted, and although he may not have acted as a director after the first ordinary meeting, and may not have been re-elected. "If qualified," he was eligible for re-election. The cases cited turned upon the question whether there was a contract to take shares. Here there is.

Aspden v. Seddon.

[(On affirming appeal), 44 L. J. R., Ch. App. 359 ; L. R., 10 Ch. 394.]

Where a man grants a piece of land, reserving the whole or a part of the subsoil, there is a presumption that the grantee is to keep it, and that the grantor must not cause the surface of the land to subside, *i.e.* to crack, break up, or be otherwise injured. The surface is to be enjoyed without being lowered. On the other hand, the minerals may be reserved with power to break the surface to get them. This was a grant equivalent to a building lease. It was a grant in perpetuity, at a rent, to a cotton company, for the purpose of building a mill. The grantee covenants to build the mill and keep it in repair. The purpose of user is not immaterial ; for it is less likely that if a house or mill is to be built, the right to throw down that house would be reserved by intention than if no such building were intended. But there is an exception of the mines and of all things necessary to get the minerals. He is not to enter on the surface ; but there is no limit to the power of underground working. There is a provision for compensation, and that makes the exception

reasonable. If a subsidence arises, it is subject for compensation. It is purely a question of the contract and its construction, and this is its construction. It is the duty of the judge to ascertain for himself, and without reference to the decisions of other judges, the construction of a document which is before him. The modern cases show this to be one of construction.

On appeal, the Lords Justices pointed out that some further words than the mere reservation of the minerals were necessary to give the right to interfere with the surface support, and that the words of the compensation clause supplied these, *viz.*, "so that compensation be made . . . for all damage that shall be done . . . by the exercise of any of the said excepted liberties."

Smith v. Darby, 42 L. J. R., Q. B. 140; L. R., 7 Q. B. 716, approved by all the judges.

COMMENT.

See also *Bell v. Love*, 52 L. J. R., Q. B. App. 290. An action on the compensation clause succeeded, the provision being held binding upon any one exercising the right reserved, and not being only an agreement personal to the original grantor. (See *Aspden v. Seddon*, L. R., 1 Ex. Div. 496; 46 L. J. R., Q. B. 353.)

Fowkes v. Pascoe.

[44 L. J. R., Ch. App. 367; L. R., 10 Ch. 343.]

The Lords Justices in this case disagreed with the M. R., although concurring in several of his observations.

If property is purchased by A. (since deceased), in the name of herself and B., a person to whom A. was *in loco parentis*, under circumstances such as to render it probable that a gift was intended, the presumption of a resulting trust may be rebutted by the evidence of B. alone, although, generally speaking, unsupported evidence of interested persons of conversations with a dead man is dangerous. It was contended that, if the claimant (B.) had proved that the testatrix (A.) had placed herself *in loco parentis* to him, yet investments made afterwards, in the joint names of A. and B. were adoptions or satisfactions *pro tanto*. But that doctrine can

only be applied as between children; against one child, in equal favour of other children, not in favour of a stranger, or one to whom the testatrix was not *in loco parentis*.

Re Flux & Co.

[44 L. J. R., Ch. 375.]

A solicitor may be cross-examined on an affidavit made by him under a common order to tax, and the examiners must take his evidence.

Jacobs v. Brett.

[44 L. J. R., Ch. 377; L. R., 20 Eq. 1.]

The defendant in a suit in the Lord Mayor's Court may move a Superior Court for a writ of prohibition to stay the suit. Sect. 15 of the Mayor's Court Act, 1857 (20 & 21 Vict. c. clvii.), applies to objections taken by the defendant in that (Mayor's) Court only.

Manning v. Farquharson, 30 L. J. R., Q. B. 22, and *Baker v. Clark*, L. R., 8 C. P. 121, not followed.

Mott v. Shoolbred.

[44 L. J. R., Ch. 380; L. R., 20 Eq. 22.]

To enable a reversioner to maintain a suit for an injunction, the injury complained of must be of a permanent character. Here the only act charged is that the defendants carry on their business in a particular manner, and so as to cause the tenants of the property to which the plaintiff is entitled in reversion to quit. That cannot be said to be an act of a permanent nature; they may alter their conduct to-morrow, or cease their business next week.

In re Coward and Adams's Purchase.

[44 L. J. R., Ch. 384; L. R., 20 Eq. 179.]

A married woman who has obtained a protection order under 20 & 21 Vict. c. 85, may solely give a valid receipt for a legacy which her husband has not reduced into possession prior to the order (see also *Johnson v. Lander*, 38 L. J. R., Ch. 229).

Harrison v. The Mexican Railway Company.

[44 L. J. R., Ch. 403 ; L. R., 19 Eq. 358.]

If, according to the true construction of articles of association, power to issue preference shares is given, that power need not be stated in the memorandum of association.

COMMENT.

The M. R. here said, that if the articles were silent, there was an implied condition that all shareholders were entitled to rank equally as to profits, but that if the articles showed this not to be the original intention, there was no such legal implication, for any such was rebutted by the contemporaneous instrument. In *Guinness v. Land Corporation of Ireland*, L. R., 22 Ch. Div. 349, the Appeal Court explained that the M. R. was referring to matters which the Companies' Act did not require to be stated in the Memorandum. That which the Act requires to be provided for in the Memorandum can neither be altered by the articles nor by a special resolution. The collocation in the Act of (1) the objects of the company and (2) its capital, causes the legal obligation to apply the capital to those stated objects. L. J. Bowen said, that the only case which he could think of where dividends could be paid out of capital would be where the Memorandum provided for such payment. The only matter decided in *Harrison's Case* (*supra*) was the question of priority of dividends to a certain class. That is not required to be dealt with in the Memorandum.

In re Bethlem Hospital.

[44 L. J. R., Ch. 406 ; L. R., 19 Eq. 457.]

If settled lands have been taken under the compulsory powers of the Lands Clauses Consolidation Act, and the purchase-money has been paid into Court, the costs of applying the money in redemption of land tax on other parts of the vendor's property are payable by the company, under sect. 80. The redemption is a re-investment.

In re Macleay.

[44 L. J. R., Ch. 441 ; L. R., 20 Eq. 186.]

A devise in fee to a brother of the testatrix "on the condition that he never sells it out of the family."

Held, that "the family" meant the blood relations of the devisee, and that the condition was valid in law as a partial restraint on alienation.

First, the condition, whether good or bad, is confined within legal limits. It is only applicable to the devisee, and therefore is not void for remoteness.

It has never been laid down that you cannot restrict an owner in fee from aliening in any manner in which he may think proper, unless *Attcater v. Attcater*, 23 L. J. R., Ch. 692; 18 Beav. 330—a judgment of my predecessor with which I do not agree—is such a decision.

According to Littleton (s. 361, Shep. Touchs.) the test is—Does the condition take away all power of alienation?

It is true that a condition that the devisee shall not alien except to a named person, who cannot purchase, will not do, because it is an indirect, complete restriction on alienation. It is a question of substance, and not of mere form.

You may restrict a particular class of alienation, or alienation to a particular class, or you may confine it to a certain time.

This condition is limited: (1) Because it is against selling only, whereas the devisee may mortgage, lease, or settle, and thus alien; (2) as regards class, he may sell to any member of the family, of whom there were, as the will shows, many.

The condition, if unlimited as to time, would be void under the rule against remoteness. But this is limited to the life of the devisee.

In *Attcater v. Attcater*, the real key to the judgment is that the late M. R. thought the restriction there equivalent to an injunction not to sell at all.

Doe v. Pearson, 6 East, 173, decides the above very point.

COMMENT.

Compare and consider *Gravenor v. Watkins*, 40 L. J. R., C. P. 197, 220; L. R., 6 C. P. Div. 500; and *M'Lean v. M'Kay*, L. R., 5 C. P. D. 327. In the first-named case the question as to the real validity of the partial restriction on alienation was not that before the Court, the real matter for decision there being solely what estate the husband took in remainder.

Fox v. Lownds.

[44 L. J. R., Ch. 474; L. R., 19 Eq. 453.]

A voluntary covenant to bequeath money to a charity is precisely the same in effect as a legacy to a charity.

Consequently, the sum to be paid would be liable to abate unless there be enough pure personalty to meet it.

The attempt is indirect here; but the effect is that, to the extent to which it is questioned, that is, to the extent of the proportion of real assets applicable to pay legacies, this is a gift out of real estate. It is invalid.

Jeffries v. Alexander, 31 L. J. R., Ch. 9; 8 H. L. 594, decides the matter.

In re The Universal Disinfecter Co.

[44 L. J. R., Ch. 478; L. R., 20 Eq. 162.]

A limited company obtained leave to defend an action on a bill of exchange after action was set down for trial, but afterwards gave consent to a judgment on terms of payment by instalments. Eight days after this they presented a petition to wind up. The plaintiffs applied under sects. 87 and 163 for leave to issue execution on the ground of the deceptive conduct of the company.

Leave refused.

There is no case in which a judgment creditor has been so allowed after the winding-up order.

A creditor has, however, been allowed to put in force, after the winding-up, an execution issued after the presentation of the petition (*In re Baston & Co.*, L. R., 4 Eq. 68; 37 L. J. R., Ch. 51). In that case, the sheriff was in possession before the winding-up order was made. But the M. R. was apparently of opinion that an injunction to restrain the execution would now be granted, as the whole nature of the winding-up involved a bankruptcy of the company, under which there should be an equitable distribution of its assets.

The misrepresentations cannot be allowed to affect other innocent creditors.

***Re Barker's Estate, Jones v. Bygott, Bygott
v. Hellard.***

[44 L. J. R., Ch. 487.]

A solicitor mortgagor improperly deposited deeds in his possession as solicitor for the actual mortgagees (trustee of his marriage settlement). He so deposited them with one T. as security for an advance to him. He suppressed his mortgage to his first mortgagees. Of course this was a fraud on T. Actuated by a desire to rectify, as far as possible, what he had done, he executed a deed which created a legal term in some other property in favour of the original mortgagees. No consideration passed for this deed, and he kept the deed in his safe, where it was found after his death. The deed was simply stated to be a "further security." Afterwards he wanted more money, and then, representing the property included in this "further security" as not encumbered, he executed a legal mortgage of it to other persons. To the "further security" the statute of Elizabeth (27 Eliz. c. 4) applies. In favour of the mortgagee a fraudulent intent in the execution of the "further security" is presumed, although it was really executed with a good intent.

The modern doctrine of notice as between solicitor and client, is more consonant with common sense than it was (a). There was no constructive notice here. The solicitor concealed everything.

If there had been notice, it would not have been different; for (1) you cannot have consideration without either contract in the first instance, or (2) notice to the person benefited such as changes his position. In the case of further security the lender gives time and forbearance for it, or some other advantage. Or if he communicates to the donor that he accepts the further security, that will do. It comes back to contract.

(a) Thus, notice to a solicitor for a trustee is not necessarily notice to the trustee. See *Saffron Walden Building Society v. Rayner*, L. R., 14 Ch. D. 406; 49 L. J., Ch. 466.

Pearce v. Watts.

[44 L. J. R., Ch. 492; L. R., 20 Eq. 492.]

An agreement to sell land "reserving the necessary land for making a railway through the estate to Prince Town," is too uncertain for the Court to enforce by specific performance.

This was a purchaser's suit.

If the conveyance were executed the whole would pass to the purchaser, the reservation being void for uncertainty. That was not the intention. The vendor intended to reserve a part, a substantial part; but who shall define it?

Although the defendant might have demurred, he was allowed full costs. (See *Dush v. The Trowbridge Waterworks Company*, 47 L. J. R., Ch. 645; L. R., 10 Ch. 238.)

Russell v. The Wakefield Waterworks Company.

[44 L. J. R., Ch. 496; L. R., 20 Eq. 474.]

Where the owner of a trust fund is an incorporated company, that company must sue a stranger who has got possession of that fund. That is a general rule. If a case should arise of injury to a corporation by some of its members, for which no adequate remedy except a suit by individual corporators, such suit might be allowed. The claims of justice would be superior to technical rules (*Wallworth v. Holt*, 4 Myl. & Cr. 619; 10 L. J. R., Ch. 138).

For instance, a suit by an individual corporator to restrain the corporation from acting *ultra vires*, lies, even by a single corporator; *i.e.* he need not sue on behalf of himself and others. Another exception is in the class of case like *Atwood v. Merryweather*, 37 L. J. R., Ch. 35, where a corporation is controlled by a wrongdoer, so that a minority suffer.

Re The Anglo-Danubian Steam Navigation Company, *Ex parte* The International Financial Association.

[44 L. J. R., Ch. 502; L. R., 20 Eq. 339.]

The only limit to the borrowing powers of a company in articles of association was that the sum borrowed should not exceed one half of the nominal capital for the time being. The words of Article 29 are not only "may secure the repayment of"—a form of expression in Railway Acts which has been held to prevent issue of securities at a discount—but also raise "any money authorized to be borrowed." The directors may, therefore, issue debentures at a discount, and pledge the whole nominal capital to secure them.

Marshall v. Cruttwell.

[44 L. J. R., Ch. 504; L. R., 20 Eq. 328.]

A man was in failing health, and desirous of being relieved from business troubles. He opened a fresh banking account in the joint names of himself and his wife, giving the bank a special authority to cash cheques drawn either by his wife or himself. So matters remained until his death. The manager of the bank deposed that the man had told him that the balance of the account current would belong to the survivor of them; but I attach no importance to that. If a man transfers stock into the joint names of himself and wife, he retains dominion over it, and can have it re-transferred into his own name at any time. In that case, if he does not exercise this dominion, the only conceivable motive is that he meant to benefit the wife if she survives; but that reasoning does not apply here. There is a resulting trust for the testator.

COMMENTS.

See also *Lloyd v. Pughe*, *Evans v. Pughe*, 42 L. J. R., Ch. App. 282; L. R., 8 Ch. Div. 88. The wife is really, in a case like the above, only the agent of her husband. A transfer of railway debentures into the joint names would be the same as one of

stock, and would imply an intention to advance (*In re Eykyn's Trusts*, L. R., 6 Ch. Div. 115). The Married Women's Property Act of 1882 does not seem to affect the reasoning in these cases. Sects. 8 and 9 are confined to deposits in the name of any married woman jointly with any persons or person other than her husband.

Where a widow transferred stock into the names of herself, her daughter, and her daughter's husband, the ultimately surviving husband was held entitled, although the widow had herself during her life received the dividends (*Batstone v. Salter*, L. R., 10 Ch. 431; 44 L. J. R., Ch. 760).



Re Harper and the Great Eastern Railway Company.

[44 L. J. R., Ch. 507; L. R., 20 Eq. 39.]

When an award is made a rule of Court under sect. 36 of the Lands Clauses Consolidation Act, the Court has jurisdiction, under 9 & 10 Will. 3, c. 15, with respect to setting it aside and enforcing it.



Briggs v. Sharp.

[44 L. J. R., Ch. 510; L. R., 20 Eq. 317.]

Testator was the owner of an advowson. From the terms of his will he evidently anticipated that the incumbent—a very old man—would die in his lifetime. Probably, testator being himself a clergyman, he intended to present himself. Then by his will he gave 13,000*l.* to trustees to invest and pay the interest “to his wife during her life,” for the maintenance “and support of herself and our children.” Under this the children do not take anything. The wife takes the income; whether she is obliged thereout to maintain the children I do not decide. He then disposes of the advowson, but does not devise it as he should have done. He proceeds: “And as regards the said advowson, house, and glebe lands, and freehold land, I direct that, if the living becomes vacant by my death, and the advowson have not been previously sold, then the presentation be offered by my said executors to

my dear brother in the priesthood ;” and so on. That would have been illegal. If sold in his lifetime, of course there would have been nothing on which the will could operate. “And when the church is full,” he directs the executors to sell the advowson and freehold land, and to invest the proceeds and pay the interest to his wife in like manner as with the 13,000*l.* Testator died whilst the church was full (September 23, 1874), and the incumbent died February 18, 1875. In that interval the trustees ought to have sold. A gift of the proceeds of sale is a gift of the advowson itself. The mere delay of a trustee in converting does not affect the title of the *cestui que trust*. Consequently, the property and the freehold land go to the person or persons to whom the proceeds of sale are given—*i. e.* the widow takes the proceeds during her life, and the legal estate in the advowson passes to his five daughters and co-heiresses and trustees for the purposes of the will; and the widow is entitled to nominate a clerk to be presented by the daughters.

Broughton v. Broughton.

[44 L. J. R., Ch. 526.]

If a surviving partner, who is also the executor of a deceased partner carries on the partnership for eight years after his partner's death (at that time the business having been insolvent), and then sells the business for 1,700*l.*, he is, in an action for the administration of the deceased partner's estate, only liable to be charged with the value of the moiety of the value of the goodwill at the partner's death.

Robinson v. Ashton, Ashton v. Robinson.

[44 L. J. R., Ch. 542.]

The “profits” of a partnership *prima facie* include the value of a rise in the value of partnership assets.

In re Berdan's Patent.

[44 L. J. R., Ch. 544; L. R., 20 Eq. 346.]

The M. R. has jurisdiction to take off the file a disclaimer of part of an invention, filed without the authority of the patentee. He is both a judge and the keeper of the records. *In re Sharp's Patent*, 10 L. J. R., Ch. 86; 3 Beav. 245, distinguished.

COMMENT.

And see now 46 & 47 Vict. c. 57, s. 19.

***The Duke of Bedford v. Dawson.***

[44 L. J. R., Ch. 549; L. R., 20 Eq. 353.]

If a company, whose Act incorporates the Lands Clauses Consolidation Act, have power to acquire land and build thereon for the purposes of the railway clearing system, they have power to build so as to obstruct an ancient light of an adjoining house, making compensation as for lands injuriously affected—subject to a remedy, if they flagrantly abuse their powers. They are the sole judges of what is necessary.

***In re Berkeley's Estate, Berkeley v. Mason.***

[44 L. J. R., Ch. 554; L. R., 19 Eq. 467.]

A doubt existed (founded on *Re Newbery*, 10 W. R. 378) whether the decision in *Secell v. Ashley*, 3 De G., M. & G. 933; 22 L. J. R., Ch. App. 659, that a legatee may, by summons under sect. 45 of 15 & 16 Vict. c. 85, obtain the usual decree for administration, serving the executor only, applied to the case of a legacy under the will of a married woman executed pursuant to a power.

Held, that it did so apply.



Lees v. Coulton, Lees v. Clutton.

[44 L. J. R., Ch. 556 ; L. R., 20 Eq. 20.]

In a partition suit a complicated title was established at the hearing. All parties in existence were before the Court. One share had, however, been settled, so that there were as to that contingent estates in unborn issue. Held, that an immediate decree for sale might be made, the trustees for settled share being before the Court, they being declared trustees of that interest, and the beneficiaries, if any, being also so declared as from the time of their births. A separate application for the appointment of a new trustee to convey was ordered.

And see succeeding case of *Basnett v. Moxon*, 44 L. J. R., Ch. 557 ; L. R., 20 Eq. 182.

Commins v. Scott.

[44 L. J. R., Ch. 563 ; L. R., 20 Eq. 11.]

A memorandum annexed to particulars and conditions of sale was signed by C., a solicitor, "as agent for the vendors." Neither the memorandum nor the conditions nor particulars disclosed the names of the vendors, but both showed that the vendors were "a company in possession of, and carrying on, mining operations on the property." Held, a sufficient description within the Statute of Frauds. Held, also, that parol evidence was not admissible to show who were the principals.

The parol evidence was not admissible because the memorandum was in form a complete contract. If it had been made by agents in their own names in this form simply: "A. B. agrees to sell Blackacre to C. D. for 100%," parol evidence would have been admissible to show who were the principals and to charge them.

The 5th, 6th, 7th, 8th, 9th, and 12th conditions show that the vendors are in possession, in their own right, of property

on which they have been carrying on business. The description is reasonably sufficient.

[The above follows from the decisions as to "the proprietor" (*Sale v. Lambert, ante*), "proprietors in possession" (*Rossiter v. Miller, ante*), and "a trustee selling under a trust for sale" (*Catling v. King, ante*).]

Waynford v. Heyl.

[44 L. J. R., Ch. 567 ; L. R., 20 Eq. 567.]

The separate estate of a married woman is liable for all contracts made by her with reference to that separate estate. But she is not liable for general torts, nor for breaches of trust unless arising under the same instrument as that which creates the separate estate.

COMMENT.

Of course the provisions of the Married Women's Property Act, 1882 (sect. 1, sub-ss. 2, 3, and 4), entirely alter this.

Re Arthur Average Association, Ex parte Cory and Another.

[44 L. J. R., Ch. 569 ; L. R., 10 Ch. Div. 542 (appeal affirming the Master of the Rolls).]

A mutual marine insurance association issued policies signed by managers "per procuration of" the several members of the association. The 30 Vict. c. 23, s. 7, requires a specification of the names of the subscribers or underwriters in such a case. Held, (1) that there was no sufficient specification by the above signature ; (2) held, also, that a mutual assurance association is one for the acquisition of gain, and as such should be registered under the Companies' Act, 1862, if

it consists of more than twenty members; (3) held, also, that a company which ought to be, but is not, registered under the above Act, is not to be treated as an "unregistered company" under the same Act (s. 199).

COMMENT.

The M. R.'s decision, at first questioned, is now approved by the Court of Appeal. (See *In re The Padstow Total Loss Association*, *post.*)



Churchill v. Denny.

[44 L. J. R., Ch. 578 ; L. R., 20 Eq. 534.]

A recital in a marriage settlement was: "The present and future property of the said A. E. D. shall be settled as hereinafter mentioned." The covenant was: "If the said A. E. D. now is, or shall during the said coverture, at any time, from any one source, become entitled to real or personal property of the value of 100*l.* or upwards, it shall be settled," &c.

As a half-pay lieutenant, A. E. D. was entitled, during her Majesty's pleasure, to receive his half-pay. This was not, strictly, property. He was liable to dismissal. The half-pay amounts to wages. It is not assignable, either, within the policy of the law. A commutation of the half-pay at a capital sum took place. Does the covenant apply to that sum? This depends on the meaning of the words "become entitled." They mean "to acquire title" (*Wilton v. Colvin*, 3 Drew. 617 ; 25 L. J. R., Ch. 850). If a man has a thing to sell, and sells, and receives the purchase-money, he does not acquire a future title to it. It is the existing title which enables him to get the money by varying the investment. If a man has Consols which are not within the covenant, because it only refers to what he shall become entitled to, and with the proceeds buys Reduced Annuities, he does not "become entitled" to the latter within the covenant. If a thing itself

was not within the covenant, how can the proceeds of it when sold be so ?

COMMENT.

Supposing the words of the covenant are read as if there had been commas after the words "now is," and, again, after the word "become," is the statement that the covenant refers only to a future title quite accurate? Of course this query is irrespective of the other ground for the decision.



***In re* The Globe New Patent Iron and Steel Company.**

[44 L. J. R., Ch. 580 ; L. R., 20 Eq. 337.]

Section 79 of the Companies Act, 1862, provides that a company may be wound up whenever it is "unable to pay its debts." By sect. 80 four cases are mentioned where the order should be made. The fourth case covers the other three. It is where it is proved to the satisfaction of the Court that the company is unable to pay its debts. Here the company's acceptance for a large amount (1,150*l.*) for goods sold and delivered was dishonoured, and the money remains unpaid. That is sufficient.



Wills v. Wills.

[44 L. J. R., Ch. 582 ; L. R., 20 Eq. 342.]

The will first makes a provision for the testator's two children, and then for his grandchildren. Then it gives the income of the residue of the estate to the two sons equally for their lives. Then it proceeds: "And at their death the principal to be equally divided between the children of the said C. T. W. and I. W." (the two sons).

The expression cannot be literal. Both would not die at the same time. The words mean "at the death of each respectively." The only other possible construction is "at the

death of the survivor." But that gets rid of the word "their." I prefer taking it "at their respective deaths." There is no gift of the moiety of the income to any one after the death of either of the sons. The literal construction will not do. The words "their children" mean "their respective children." The principal of the moiety which produces income that has been set free, goes at once to the children of the son who died; and thus the natural presumption that, on the death of either child, the testator intended to provide for grandchildren, is satisfied (*Arrou v. Mellish*, 1 De G. & S. 355, is in point).

Middleton v. Pollock.

[44 L. J. R., Ch. 584; L. R., 20 Eq. 29.]

As a general rule, debts arising in different rights cannot be set off either at law or in equity. If there is some equitable ground for asking protection from the legal demand, the case is different. The Court will not take the account of a testator's estate which would be necessary to ascertain whether a valid cross demand exists.

[Dicta in *Cochrane v. Green*, 9 C. B. R. 448; 30 L. J., C. P. 97, disapproved.]

Bothamley v. Sherson.

[44 L. J. R., Ch. 589; L. R., 20 Eq. 304.]

A gift of "all my shares and stock in the Midland Railway Company," &c., since the Wills Act, is specific.

What does a specific bequest mean?

In the first place, it is of a part of the testator's property. A general bequest may or may not be so. A man who gives 100*l.* moneys or 100*l.* stock may or may not have the exact subject of the gift. If he had not the amount, the executors would have to get it.

In the next place, it must be a part, emphatically, as distinguished from the whole, or the whole residue; a several or distinguished part.

The part may be defined in any way which distinguishes it. "The black horses which I now have," or "which at my death I may have," will do (*Stewart v. Denton*, 4 Dougl. 219; *Fontaine v. Tyler*, 9 Price, 94).

The observation of Sir Thomas Plumer, in *Parrott v. Worsfold*, 1 J. & W. 594, that a specific legacy must be one liable to ademption, is thus incorrect.

By the old law, the gift would have been specific to the extent of then possessed shares.

In the cases of *Dummer v. Pitcher*, 2 Myl. & K. 262, and *Fielding v. Preston*, 1 De G. & J. 438, the gifts were held general, on the ground that the word "my" preceding the gift of the described article, was followed by an enumeration of general personalty in a residuary form—a mere enumeration of particulars making up a residue.

The Wills Act has not narrowed the law as to, but has in one instance widened, the effect of specific bequests. As to real estate this is well settled. There are certain specific bequests described as generic—thus: "All my household furniture." In such cases the new law includes substituted articles of furniture, &c., reading the will as "the household furniture belonging to me at my death." But the gift remains specific.

Thus, in *Lady Langdale v. Briggs*, 26 L. J. R., Ch. 27; 8 De G., M. & G. 391, a bequest of "my leaseholds" was held to comprise after-acquired leaseholds.

If a testator pledges a specifically bequeathed property or article, the legatee has, as a rule, the right to have it redeemed out of the general personal estate. (*Knight v. Davis*, 3 L. J. R., Ch. 81; 3 Myl. & K. 358.) If it is pledged for some one else's debt (such as for the debt of testator's friend) for more than its value, the executor must not apply the personal estate in redeeming it, but must compensate the legatee—that is, pay him the value of the legacy—out of the general assets.

COMMENT.

See also *Re Ovey*, *Broadbent v. Barrow*, *post*.

Chambers v. Green.

[44 L. J. R., Ch. 600; L. R., 20 Eq. 552.]

If a stranger comes to a superior Court for a prohibition, he must show that the inferior Court is clearly exceeding its jurisdiction, both in fact and law. (*Worthington v. Jeffries*, L. R., 10 C. P. 379; 44 L. J., C. P. 209, not followed.)

Fenwick v. The East London Railway Company.

[44 L. J. R., Ch. 602; L. R., 20 Eq. 544.]

Sect. 32 of 8 Vict. c. 20, providing for the manufacturing and working by a railway company upon lands of which they have taken temporary possession, of materials of every kind used in the construction of the railway, only applies to such matters as side cuttings for earth or soil, deposit of spoil, to obtain materials for the railway, or to form a road for their purposes. Making mortar to be used in the construction is not one of these purposes, the proviso at the end governing the whole—viz. “that nothing in this Act contained shall exempt the company from an action for nuisance or other injury.” The “powers aforesaid” mentioned in sect. 32 mean only the powers mentioned in that section, and do not include those mentioned in sect. 16.

Following *Regina v. The Wycombe Rail. Co.*, 8 B. & S. 259; 36 L. J. R., Q. B. 121, held, also, that making mortar was not a necessary act within sect. 16; for the company might get mortar elsewhere, and, therefore, the act of making it was not indispensable.

Drinkwater v. Ratcliffe.[44 L. J. R., Ch. 605; L. R., 20 Eq. 528; and *Pitt v. Jones*, *post.*]

Sect. 5 of the Partition Act, 1868 (31 & 32 Vict. c. 40), gives a new power of sale, distinct from that conferred by

sects. 3 and 4. The provisions applying to sales under sect. 5 do not apply to sales under sects. 3 and 4.

Lord Hatherley's remarks hereon—in *Pemberton v. Barnes*, 40 L. J. R., Ch. 675 ; L. R., 6 Ch. Div. 685—disapproved.

A married woman cannot, under sect. 5, undertake to buy the shares of parties who request a sale.

[As regards the last point, see new provisions of the Married Women's Property Act, 1882.]

Webb v. Earle.

[44 L. J. R., Ch. 608 ; L. R., 20 Eq. 556.]

A registered company authorized the issue of 25,000 first preference shares on the following terms: "The preference capital authorized is 250,000*l.*, carrying dividends at 10*l.* per cent. per annum, payable half-yearly, and entitled to a *pro rata* participation in surplus dividends after 10*l.* per cent. has been paid on the ordinary share capital of 650,000*l.*"

Held, that holders of these preference shares must have arrears of preferential dividends made good out of profits of subsequent years.

Ross v. Parkyns.

[44 L. J. R., Ch. 610 ; L. R., 20 Eq. 331.]

The question was whether a certain agreement in special terms was one of hiring and service, or of partnership.

The mere participation in profits is cogent evidence of partnership, although not conclusive. In this agreement there is no mention of partnership. Then the word "salary" is used. Then follows a provision that P. (the real owner of the business) is to have four-fifths of the profits, and R. one-fifth thereof ; and another provision that any loss should be entirely borne by P. ; and the expression is "if any loss shall

accrue to P.” And there is another provision that if, after annual division of profits, “any unexpected claim or demand” should be made upon the said parties, R. was only to be called upon to return out of any profits received by him his contribution towards such claim. In no case is the salary (which was really payable entirely by P.) to be reduced.

P. is the owner of the business, and R. the servant. It is not a partnership contract.

Smith v. Peters.

[44 L. J. R., Ch. 613; L. R., 20 Eq. 511.]

If a man agrees to sell the lease and goodwill of a public-house, and the fixtures and furniture therein, at a fair valuation by a person named in the contract, and then refuses to allow the valuer to enter, he will be ordered, on interlocutory application, so to allow him (see *Kynaston v. The East India Co.*, 3 Swanst. 274; S. C. 3 Bligh, 153).

If the named valuer be unable or unwilling to value, the contract cannot be enforced (*Vickers v. Vickers*, L. R., 4 Eq. 529; 36 L. J. R., Ch. 946). But a man may not take advantage of his own wrong to defeat his own contract.

In re The Malaga Lead Co. (Firmstone's Case).

[44 L. J. R., Ch. 617; L. R., 20 Eq. 524.]

By sect. 25 of the Companies Act, 1862, “every share . . . shall be deemed . . . issued, and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the registrar . . . before the issue of such shares.” “The contract,” of course, is that with reference to the shares to be

issued under it, and "duly made in writing" means signed by the contracting party. There is none such here; but it is said that F., having been a shareholder at the time these bonus shares were issued (which were registered in his name as fully paid-up shares of equal value with debenture bonds which he took), the Articles of Association amount to the necessary contract with him. As I read them, however, they contain no contract to take bonus shares. There is a contract that there shall be power to raise money by bonds to be issued, and to annex to these bonds paid-up shares, but no contract by any one to take these shares.

Pritchard's Case, L. R., 8 Ch. 956; 42 L. J. R., Ch. 768, is in point.

**Middleton v. Pollock, *Ex parte* Knight
v. Raymond.**

[44 L. J. R., Ch. 618; L. R., 20 Eq. 515.]

Joint creditors cannot set off as against the joint demand the several debt to one of the joint creditors; nor is there any difference if the debt sought to be set off was contracted by fraud.

***In re* The Pelotas Coffee Co. (Karuth's Case).**

[44 L. J. R., Ch. 622; L. R., 20 Eq. 506.]

There can be no contributory of a company ordered to be wound up, unless he be an actual shareholder or has agreed to take shares. A man who has agreed to take shares may have agreed to take existing shares from a shareholder or unallotted shares from the company. The burden of showing the alleged agreement by K. to take the fifty shares is on the liquidator, since K.'s name is not on the register. The liquidator produces the memorandum of association, with K.'s signature agreeing to take ten shares only; and he alleges that it appears by the articles, of even date, also signed by

K., that he is liable for forty shares more. The articles only say that the qualification of a director shall be fifty shares; that K. shall be one of the first directors; and that the office shall be vacated when fifty shares in the company are not held. "Ceasing to hold" implies a prior holding. Is the qualification clause intended to apply to the first directors? It is impossible that K. could have acquired more than ten shares except by some subsequent proceeding. K. was not obliged to take the fifty shares (*Brown's Case*, L. R., 9 Ch. 102; 43 L. J. R., Ch. (App.) 153). Becoming a director only amounts to an agreement to obtain fifty shares (the qualification) within a reasonable time. Such had not elapsed in this case. K. had not acted as a director when, within three days from issue of prospectus, he withdrew. K. is only a contributory for ten shares.

Smith v. Smith.

[44 L. J. R., Ch. 630; L. R., 20 Eq. 500.]

The mere fact that buildings complained of are completed before the bill is filed, or that the damage admits of pecuniary compensation, will not prevent the issue of a mandatory injunction to compel removal of such buildings. It was admitted that, before Lord Cairns's Act, a mandatory injunction would have issued. Of course a legal right may be lost by acquiescence. But here the defendant knew that he would obscure plaintiff's light. On March 1, 1875, the plaintiff noticed that the defendant was taking off a roof from his own kitchen; but he was not to assume from this an intention of defendant to do a wrong in the rebuilding on that site. When he saw the rebuilding he served the notices.

In granting mandatory injunctions, the Court did not mean that the acts could not be compensated by damages, but that they were those which it was difficult to assess in money value—cases in which, unless granted, the defendant would substantially be allowed to purchase the plaintiff's property.

Baker v. White.

[44 L. J. R., Ch. 651; L. R., 20 Eq. 166.]

The subject of the contract for sale comprised freeholds and copyholds. From the time of Lord Raymond it has been settled that a gift of freeholds to trustees in trust to permit a man to take the rents during his life, without more, does not give the trustees the legal estate. It was treated as analogous to an executed use, on the ground that the will afforded an index of intention that the same rules which the Statute of Uses made applicable to settlements of real estate should be applied to devises. On the same principle, under a devise of real estate to the use of A. upon trust for B., A. was held to take the legal estate. The technical language of conveyances under the Statute of Uses having been adopted, it was held that this amounted to an expression of intention that the same mode of construction as under that Statute should be adopted. Otherwise, of course, the Statute of Uses, which was passed before the Statute of Devises, was not applicable. In comparatively modern times the question arose upon a gift of this kind. Granted that a gift of freehold lands to a trustee upon trust to pay the rents over to any one must pass the legal estate to the trustee (because, otherwise, he could not receive, and, therefore, could not pay them), what happens on a gift of such lands "to A. B. upon trust to pay to, or permit C. D. to receive, the rents?" That, contrary, perhaps, to what I might have decided, is settled by *Doe d. Leicester v. Biggs*, 2 Taunt. 109, which decided that the legal estate in that case does not pass to the trustees, but to the beneficiary. The *ratio decidendi* was that the second direction, being the latest in the will, was to be followed; and it was inconsistent with the first, which had to be discarded. The other construction would have been founded on the argument that the power to receive showed an intention to confer the legal estate. I might have preferred that; but the law is settled by the above case. The gift here is exceedingly similar to that in *Doe v. Biggs* (*supra*), and undistinguishable therefrom.

Then it is said : There is in the case now before me a receipt clause; not all the same persons are both trustees and executors; the receipt of the trustees and executors is to be sufficient. That is not without weight; but, as I can give effect to the clause without holding it applicable to rents of freehold estates, I must do so.

Lord Romilly, in deciding on this very will in *Baker v. Parson*, 42 L. J. R., Ch. 228, held that, as this clause included freeholds and copyholds, there was "attraction" of the legal estate in the freeholds by the legal estate in the copyholds. But why this preference in attracting powers to copyholds? If the analogy of physical theories be useful, the weightier and more important freeholds would attract the copyholds. There can be no theory of attraction one way or the other. *Houston v. Hughes*, 6 B. & C. 403, does not warrant that theory. There the charge of debts on the real estate which really existed, coupled with the devise of the lands to the trustees and their heirs, gave them the fee without more. Justice Bayley there said : " Where an estate is given to trustees, and their heirs indefinitely, the trustees will take the fee, if the purposes of the trust require that they should have the absolute property in them, or that they should take it for an indefinite time, unless a contrary intent is manifest." Now the law is wider; the trustees take the fee unless it can be shown that the estate is distinctly limited; the *onus probandi* is on those who seek to limit the estate. The judge then goes on to refer to the mixing of the two sorts of property—freehold and copyhold—as an additional ground for his decision that the trustees took the legal fee. He failed to notice that, if the freeholds and copyholds remained together while the trusts required, there was no reason why they might not afterwards separate. That was the whole question.

Is there any doubt that you can give freeholds, copyholds, and leaseholds together, without conferring a similar estate or interest in all?

As to the copyholds, the gift to A. upon trust for B. gives

a legal estate to A. The reason is that the Statute of Uses affords no analogy, because it never did apply to copyholds.

Then is a gift of copyholds to A. and his heirs upon trust for B. for life, and after the death of B. upon trust for C. in fee, one which necessarily carries the absolute interest in the copyholds to the trustees? As to freeholds, you do not, under an indefinite gift to trustees, with a definite period for the existence of the trust, assume that a larger legal estate was intended to pass to the trustee than is necessary for the performance of the trust during that definite period. So that, as to freeholds, C. would take the legal estate after the death of B. If instead of a simple remainder the testator begins again thus: "I give Blackacre to A. and B. and their heirs upon trust to pay the rents to C. for life, and after the decease of C. I give Blackacre to D.," that is a new devise, under which D. takes the legal estate. The rule is the same as to copyholds. It was really decided to be so in *Doe v. Willan*, 2 B. & Ald. 84. And as to leaseholds (*Sterenson v. The Mayor, &c., of Liverpool*, 44 L. J. R., Q. B. 34; L. R., 10 Q. B. 81).

So that, as to all three descriptions of estates, where there is an indefinite devise to trustees and their heirs upon trust to pay to, or allow some one to receive, the rents during life, followed either by a simple remainder to another person in fee or in tail, or as another person shall appoint, but giving an absolute interest, or followed by a new devise to a person in fee or in tail, or giving an absolute interest, the estate of the trustees is limited by implication to the life of the person taking the first life interest. The rule is the same whether the tenant for life is a man, or a married or unmarried woman, and is irrespective of all considerations as to separate use.

Jones v. Chappell.

[44 L. J. R., Ch. 658; L. R., 20 Eq. 539.]

The erection upon land of new buildings which *per se* improve it, cannot be waste. In order to prove that, injury to the inheritance must be proved—injury in the sense of destroying the identity of the property, or impairing evidence of title, not merely injury in the sense of depreciation.

In respect of a temporary nuisance, *e. g.*, sawing of stone on adjoining premises, the reversioner cannot maintain an action (*Simpson v. Savage*, C. B. R., N. S. 347; 26 L. J. R., C. P. 50), even if the tenants are weekly tenants; yet, unless the landlord is in occupation, in his own right, of a part of the property, such weekly tenants would be the proper plaintiffs in respect of such a nuisance. The reason is that the defendant may choose to cease the nuisance before the landlord is entitled to possession. To a weekly tenant, suing with the landlord, I should grant an injunction.

May v. O'Neill.

[44 L. J. R., Ch. 660.]

A covenant not to practise as an attorney within a certain limit includes practice in the Bankruptcy Courts as well as in every other Court in the kingdom. The covenant was not to practise in London or in the counties of Middlesex or Essex. Held, not too large, and therefore good.

In re Cull's Trusts.

[44 L. J. R., Ch. 664; L. R., 20 Eq. 561.]

A fund was claimed by a widower in default of appointment by his late wife. By the terms of the settlement made on their marriage, it devolved on the husband in the above event. The lady had always acted through one firm of solicitors only, and they wrote to the trustee's solicitors that this was so, and that no appointment had ever been made as far as they knew. The trustee declined to accept this as

satisfactory, and paid the fund into Court. He relied on *Re Wyllly's Trusts*, 28 Beav. 458.

The Master of the Rolls would not follow this, and thought the solicitors' letter quite sufficient. It was such evidence as would satisfy an ordinary conveyancer. In future cases in his Court trustees so acting would have to pay costs of payment into Court. A statutory declaration might, perhaps, be asked; but in ordinary cases, even that could safely be dispensed with.

In re The Australian Direct Steam Navigation Co.,
Ex parte Baker.

[44 L. J. R., Ch. 676; L. R., 20 Eq. 525.]

A company owning a ship was ordered to be wound up April 17, 1875, and an official liquidator was appointed. On May 26, 1875, the master of the ship initiated an Admiralty suit for wages, &c., and obtained a warrant, and arrested the ship. Held, that this arrest was void under sect. 163 as a "sequestration." If the master had a maritime lien as claimed, he might have enforced it by summons in this Court in the matter of the winding-up. "Sequestration" in sect. 163 means the detention of property by a Court of justice to answer a demand made.

In re The Phoenix Bessemer Steel Co.

[44 L. J. R., Ch. 683.]

If the memorandum of association states one of the objects of the company to be the raising of money for its purposes upon mortgage or charge of its property, or upon the debentures, bonds, bills, notes, or any other security of the company, and the articles, following it, give express power to mortgage future calls, this mortgage may be made.

The difficulties as to mortgage of future calls mentioned

by Turner, L. J., in *Stanley's case*, 33 L. J. R., Ch. 535; 4 De Gex, J. & S. 407, were not present to the legislature; for 8 Vict. c. 16, s. 8, gives this power if the Act authorizes borrowing on mortgage. The directors may be ordered to make calls and pay proceeds to a receiver, or a receiver may be ordered to make calls and receive the proceeds.

The words "upon mortgage or charge of any property of the company," would not, in themselves, authorize the mortgage of future calls; but the following words, "or upon . . . any other security of the company," embrace the power.

Ebbs v. Boulnois.

[44 L. J. R., Ch. 691 (on appeal); L. R., 10 Ch. 479.]

Both in bankruptcy and liquidation, where the debtor has obtained his discharge in the ordinary manner, all future assets belong to him. The form of discharge is No. 124. It does not signify that the liquidation has not been closed by a resolution of the creditors. "The M. R. was right."

[The M. R. expressed his opinion distinctly against *Re Bennett's Trusts*, L. R., 19 Eq. 245; 44 L. J. R., Ch. 244, but felt bound to follow it. The lords justices overruled *Re Bennett's Trusts*.]

Printing and Numerical Registering Co. v. Sampson.

[44 L. J. R., Ch. 705; L. R., 19 Eq. 462.]

There is nothing against public policy in a contract to assign the patent of any inventions which a man may make or thereafter patent. It is said that, having already obtained his price, he would not invent, or would keep his invention secret. If public policy requires one thing more than another it is full freedom of contract to adults of competent understanding. Some of the greatest inventions have been given freely to the world. Nothing is more common than

for a man to anticipate his intellectual product and sell it before it exists; *e. g.* a contributor to a periodical agrees to devote his exclusive services to it for a certain period, &c. Public policy is really the other way, for thereby the needy are encouraged.

Leader v. Moody.

[44 L. J. R., Ch. 711; L. R., 20 Eq. 145.]

The lease of a theatre contained covenants that it should not be used for other than theatrical purposes. The lessee sub-demised certain boxes and stalls for theatrical purposes. The sub-lessee demised the theatre for three months for the purpose of religious meetings. Any permanent alteration of the theatre so as to convert it to purposes not theatrical is a breach of the covenant. Whether an injunction will be granted depends on the permanence or otherwise of the alteration—*e. g.* a gate may be locked for a temporary purpose, or, as in *Kidgill v. Moor*, 19 L. J. R., C. P. 177; 9 C. B. R. 364, with a view to stop the exercise of a right of way for ever. In the former case no injunction would be granted; in the latter it would be granted. The intention must be considered. This was only a temporary arrangement (for three months) during which religious meetings were to have been held. The alterations are temporary structural alterations, removable in two weeks. I award reasonable damages, instead of granting an injunction, and give costs.

Taylor v. Taylor.

[44 L. J. R., Ch. 718; L. R., 20 Eq. 155.]

I shall not be the first judge to hold that sums of money voluntarily given to a son, of various amounts, and to aid in the son's maintenance, are advancements by way of "portion

or provision," within the Statute of Distributions (22 & 23 Car. II. c. 10), s. 5. To be within it the advancement must be by way of provision, not a casual payment. Of course if the sum is large, there is a presumption that it was to start the son in life; if it is small, there is no presumption either way; evidence to show the purpose must be given.

Varying yearly sums paid until the marriage, and fixed yearly sums afterwards, a fee to a special pleader, dues to an Inn of Court, outfit and passage money of a son in the army, and his wife to India, and payment of debts, without payment of which he must have left the army, held not "advancements by portion" within the above statute.

A son's entrance fee to one of the Inns of Court; the price of his commission in the army, and contemporaneously for his outfit; and certain sums for establishing him, late in life, in business, held to be such advancements.



Taylor v. Taylor, *Ex parte* Taylor.

[44 L. J. R., Ch. 727; L. R., 20 Eq. 297.]

Section 32 of the Leases and Sales of Settled Estates Act, giving the tenant for life "entitled to the possession or to the receipt of the rents and profits" of lands certain leasing powers, does not extend to a person entitled, subject to the discretion of the Court, to such rents and profits; *e. g.* to an equitable tenant for life, to whom, under some circumstances, the Court might give possession.



Tufnell v. Borrell.

[44 L. J. R., Ch. 756; L. R., 20 Eq. 194.]

The devise here is to W. M. for life, and after his death without issue to "all and every my grandchildren, their

heirs male, and the heirs male of the survivors and survivor of them."

There being no words of severance, the grandchildren took as joint tenants for life, with several inheritances in tail male.

There were originally nine grandchildren. Five died without barring their estates tail, and their issue ultimately failed. The other four barred their estates tail. As to three of the four no question arises, each taking one-fourth. The question arises as to the fourth. When he barred his estate he was entitled to one-fourth for life, with remainder as to one-fifth in tail male; and, in the event which happened (failure of issue of one of the deceased grandchildren), he was entitled to one-fourth of another fifth in tail male. Of what was he protector? The common sense of the thing is to make him protector of the same share of which he was tenant in tail. I so hold.

The principle of *Church v. Edwards*, 2 B. C. C. 180, applies.



The Attorney-General v Webster.

[44 L. J. R., Ch. 766; L. R., 20 Eq. 483.]

In ancient times, certain lands were given to feoffees, upon charitable trusts. The statutes avoiding such trusts as "superstitious" were passed; and, by subsequent statutes, the property vested in the Crown, without office found. In 1585 an arrangement was made whereby Lord Wentworth bought the property from the Crown. Out of moneys raised from the property the feoffees obtained a re-grant to two persons absolutely, without any trust expressed. Ever afterwards the application had been for valid charitable purposes.

Held, that such property was not private property of the parish, but was subject to the jurisdiction of the Charity Commissioners.

An advowson, with right to nominate the incumbent, may be vested in parishioners as private property not so subject;

but all other parish property is charity property (*The Attorney-General v. Lord Hotham*, 1 Turn. & R. 209).

The reason for the exception is that, as to an advowson, the parishioners cannot get individual profit: they can only nominate the incumbent. Moreover, the man who performs Divine service and administers to the spiritual wants of a parish, is in a grand sense a trustee for the parish; the parishioners have only the right to select such a trustee. The exception can be therefore reconciled, on the ground that this is a mere mode of selecting a charity trustee.

In re **The Phoenix Bessemer Steel Co.**

[45 L. J. R., Ch. 11.]

The provisions of sect. 10 of the Judicature Act, 1875, as to winding up companies according to bankruptcy rules, do not apply to companies already wound up, where the claims of creditors have been settled prior to the Act, nor (*In re Suche & Co.*, L. R., 1 Ch. Div. 49; 45 L. J. R., Ch. 12) to companies which at the commencement of the Act were in liquidation.

Hackett v. Baiss.

[45 L. J. R., Ch. 13; L. R., 20 Eq. 494.]

In a London street 37 ft. 6 in. wide at widest part, and at narrowest 34 ft., a building owner is not entitled to erect a building to a height which will obstruct the access of light below the angle of 45 degrees to the house opposite. In the Metropolis, the legislature has adopted the angle of 45 degrees as the lowest allowable angle of incidence of light in the case of buildings on the opposite side of an ordinary street (7 & 8 Vict. c. 84, sched. 1). [And see *Theed v. Debenham*, L. R., 2 Ch. Div. 165.]

Muskett v. Eaton.

[45 L. J. R., Ch. 22 ; L. R., 1 Ch. Div. 435.]

L. M., widow, by her will dated in 1866, devised to her nephew, C. M., for his life, a freehold farm called F., and proceeded : " And in the event of his leaving a lawful son, born or to be born in due time after his decease, who should attain the age of twenty-one years, then I give the same farm unto such son and his heirs, if he shall live to attain the said age of twenty-one years ; but, in case my said nephew should die without leaving a son who should live to attain the age of twenty-one years, then I give the aforesaid hereditaments, after the death of my said nephew, C. M., to G. M. E. and his heirs."

C. M. died in February, 1875, leaving an only son, aged seven, who was the plaintiff in this suit.

Judgment.—The question is, whether "attain the age of twenty-one years" is part of the description of the devisee within *Festing v. Allen*, 13 L. J. R., Ex. 74 ; 12 M. & W. 279. It cannot be ; for a child "to be born in due time afterwards" could not be twenty-one at the death of the tenant for life, and the testatrix must be assumed to have known the course of nature. The son takes a vested estate, subject to be divested on his dying under twenty-one.

COMMENTS.

The rule in *Festing v. Allen* (*ubi supra*), is that a devise to "such child of A. as shall attain twenty-one" (*Stephens v. Stephens*, Ca. t. Talbot 228 ; *Duffield v. Duffield*, 1 Dow. & Cl. 268), or "to the children of A. who shall attain twenty-one," is *prima facie* contingent, notwithstanding a gift over in default of a child, or children, who should fulfil the required condition (Hawkins's "Const. Wills," 242).

Festing v. Allen was followed by Vice-Chancellor Wood in *Holmes v. Prescott*, 33 L. J. R., Ch. 264, in which the devise was to J. H. for life, with remainder to all and every his children who should attain twenty one, with remainder over if there should be no child who should attain twenty-one.

Browne v. Browne, 26 L. J. R., Ch. 635 ; 3 Sm. & Giff. 568, is overruled. But here, again, the rule is only one of construction, and yields readily to evidence of contrary intent in the will.

Fitzgerald v. Chapman.

[45 L. J. R., Ch. 23 ; L. R., 1 Ch. Div. 563.]

By the settlement made in 1857, prior to the marriage of F., property in which the intended wife was interested jointly with her father was vested in trustees upon trust, during the joint lives of the husband and wife, for her for life for separate use without power of anticipation ; and after her decease for the husband during his life, and then for the issue of the marriage as therein mentioned ; and if no child should live to acquire a vested interest, then, if the wife should survive her husband, upon trust for her absolutely, but if she should die in the husband's lifetime, then for such persons as she should by will appoint, and, in default, for her father. The father died in January, 1874. The only child born alive died in infancy.

In 1873, a decree was made by the Judge Ordinary, dissolving the marriage by reason of F.'s adultery. This decree was made absolute January 20, 1874. In October, 1874, the plaintiff (wife) filed her bill, praying that it might be declared that she was absolutely entitled to the property.

Judgment.—It is alleged that the final decree destroys not only the life interest of the husband, who has committed a grave offence against morality, but also an interest, very remote and contingent, of the father, who has not committed any offence.

This Court does not impose forfeiture upon any one for any offence whatever. There never was any forfeiture, even at law, for cases of this description, for adultery. There is no forfeiture at equity or common law, then. Is there any by statute ?

Adultery by the husband has never been treated by our common law in the same manner as adultery by the wife. The wife took her rights, as survivor, in her husband's property, notwithstanding her adultery. Thus she took dower until deprived of it by 13 Edw. 1. Unless the husband's interest is forfeited by statute, it remains.

Statutory dissolution of marriage was known before the Divorce Act. The powers were not delegated to a judge; but an Act was passed in each case, the effect being the same. There was not any forfeiture of interests under settlements, however.

The Divorce Acts (20 & 21 Vict. c. 85, s. 45; and 22 & 23 Vict. c. 61, s. 5) give power in cases which according to *Graham v. Graham*, (L. R., 1 P. & D. 711) are confined to cases where there exists some issue of the marriage, to modify the settlement. That express power shows the limit of the power ["Expressio unius est exclusio alterius"]. Then the father's interest assuredly could not be touched.

I disapprove of V.-C. Stuart's decision in *Jessop v. Blake*, 3 Giff. 639, and of Lord Romilly's in *Swift v. Wenman*, 39 L. J. R., Ch. 336; L. R., 10 Eq. 15; and in *Fussell v. Dowding*, 42 L. J. R., Ch. 716; L. R., 14 Eq. 421.

I approve, and I follow, the Appeal Court decision in *Evans v. Carrington*, 30 L. J. R., Ch. 364; 2 De G., F. & J. 481; 1 Jo. & H. 598.

COMMENTS.

This decision the M. R. again followed in *Burton v. Sturgeon* (reported on appeal, 45 L. J. R., Ch. 633; L. R., 2 Ch. Div. 318); and the Court of Appeal affirmed his judgment.

In consequence of these decisions, the statute 41 Vict. c. 19 was passed, sect. 3 whereof extends the powers of the Divorce Court to cases where there are no children. The consideration of this extending statute came before the M. R. and Lords Justices Cotton and Lindley, sitting in the Appeal Court, in *Wigney v. Wigney*, L. R. 7; P. D. 177; 51 L. J. R., P. D. & A. 10. The case will be given in due order, *post*.)

"The Court cannot be said to be a Court of morals" (Lord Romilly, M. R., in *Luzmore v. Clifton*, 17 L. T. R. 460).



Beresford v. Browning, Browning v. Browning.

[(On appeal), 45 L. J. R., Ch. 36; L. R., 1 Ch. Div. 30.]

Four persons entered into partnership as oil merchants. The agreement stated that all the said partners had considerable sums employed in the business, which it might be

impracticable or highly detrimental to the business to withdraw from the business immediately after the death or retirement of either of them; and provided that, in case of such death or retirement, the balance due to such retiring or dying partner should be repaid out of the business by the continuing or surviving "partners" by annual instalments of 2,000*l*.

One partner died. By suits instituted for the purpose, it was found that his share was 64,000*l*.; and the instalments were directed to be paid by the surviving partners, and the survivors and survivor of them, until further order. After some years, two of the survivors died, and then the third became insolvent. Held, affirming the M. R., that the estates of the two deceased partners were liable for the unpaid balance of the 64,000*l*.

The M. R.'s judgment: The agreement implied an undertaking by the survivors to continue the business, but not for any definite term. The effect is that the survivors are liable to pay immediately. They stipulate between themselves for time. It is a mode of regulating the payment of a debt rather than the creation of a new debt (*Bishop v. Church*, 2 Ves. Sen. 371). I can find nothing in the agreement to make the liability joint only, and not joint and several. It is said that a security taken for payment of a partnership liability, in form joint, destroys the several liability which would otherwise exist in equity. But this does not, at any rate, apply to mercantile partnerships. There such contracts are all several as well as joint (*Devaynes v. Noble*, 1 Mer. 529). In *Sumner v. Powell*, 1 Turn. & R. 423, decided by Sir William Grant (who also decided *Devaynes v. Noble*), the partnership was mercantile, but "the covenant was purely matter of arbitrary convention, growing out of no antecedent liability." It was not a partnership contract for something which the partnership had received. It was an indemnity against a liability which gave something beyond that which law or equity would have required. It does not cover the present case, therefore.

Wilmer v. Currey, 2 De G. & S. 347, was not a case of a mercantile partnership, but one of attorneys. Nor was there a pre-existing obligation. The only arguable point—viz. that the joint covenant there was a covenant by partners in a continuing partnership, who were to take over the share of the assets, and in that way would have been a partnership contract for value received by the partnership, and therefore within *Devaynes v. Noble* (*sup.*)—was not argued.

In *Clarke v. Bickers*, 14 Sim. 639, the V.-C. Shadwell only decided that the contract there was not a partnership contract. It does not militate against the rule, which remains thus:—

A mercantile partnership contract, for value given to the firm, creates a several as well as a joint liability. Such a liability is created in this case.

The Lords Justices were “of opinion that the decision of the M. R. was quite right.”

COMMENT.

The question, as it affects a partnership which is not mercantile, seems to be still open, although the M. R. and the Lords Justices apparently imply, from their observations on *Wilmer v. Currey*, that on like facts they would have extended the decision to non-mercantile firms.

Lee v. Clutton.

[45 L. J. R., Ch. 43; affirmed on appeal, 46 L. J. R., Ch. App. 48.]

The policy of the Registration Acts is to free a purchaser from the imputation of constructive notice. The authorities come to this: You may avoid a registered deed in cases of actual notice of a prior deed or charge; and, as a general rule, notice to a solicitor is notice to his client; but it is doubtful whether constructive notice is sufficient. If it is, it is only where fraud can be imputed; and where the Court is satisfied that there was no distinct proof of knowledge of a prior incumbrance, but that the holder of the registered security was aware that there were incumbrances, and purposely abstained from inquiry, a Court of Equity might postpone him.

In re The Attorneys and Solicitors Act, 1870.

[45 L. J. R., Ch. 47; L. R., 1 Ch. Div. 573.]

A solicitor agreed in writing with clients to assert their title to certain property for a percentage of 10 per cent. on net value of property recovered; in the event of no property being recovered beyond a certain legacy of 5,000*l.*, to receive only costs out of pocket. Before proceeding, the solicitor submitted the agreement to the taxing master, who, in his turn, required the opinion of the Court upon it.

Held, that as nothing had become payable under it, this could not be done, but that the agreement was probably pure champerty, and void under sect. 11 of 33 & 34 Vict. c. 28.

***In re The Humber Ironworks and Shipbuilding Co. (Williams's Case).***

[45 L. J. R., Ch. 48; L. R., 1 Ch. Div. 576.]

A director of this limited company sold some shares to W., a tradesman. W. gave the name of his foreman as the purchaser, and such foreman was registered. He was described by W. as a gentleman, and so registered, although his occupation was as above. Nine years afterwards the liquidator tries to substitute W. I cannot do this.

***Eales v. Drake.***

[45 L. J. R., Ch. 51; L. R., 1 Ch. Div. 217.]

A testator had power to appoint 10,000*l.*, by deed or will, among his children. By deed poll, executed in his lifetime, in pursuance of the power, he appointed 3,000*l.*, part of the above, to his son G. D. E. By his will he appointed 1,995*l.*, part of the 10,000*l.*, to his son C. E., 4,000*l.* further to G. D. E., 4,000*l.* to trustees for J. T. E., to pay the income thereof to him for life, or until he should charge or incur the same, and 5*l.* to his daughter and only remaining child,

H. S. E. Thus the two appointments together were 3,000*l.* in excess of the power.

One son (G. D. E.) died in his father's lifetime, so his share lapsed. Held, that the deficiency of the shares of the surviving appointees were to be made up out of the lapsed share, and that J. T. E. was bound to bring into hotchpot with the representatives of G. D. E. the value of the interest given to him (J. T. E.) during life or until forfeiture, before participation in the eventual residue.

In re **Packman and Moss.**

[45 L. J. R., Ch. 54; L. R., 1 Ch. Div. 214.]

As to devises by a mortgagee, you must ascertain from the whole will whether a testator is dealing with his beneficial property or with that of which he is (as mortgagee) in a sense trustee. Probably the observations of Lord Eldon to this effect in *Lord Braybroke v. Inskip* (8 Ves. 417), were not present to the mind of V.-C. Malins in *Martin v. Laverton*, 39 L. J. R., Ch. 166; L. R., 9 Eq. 563.

In re **The Harwich Harbour, &c. Co.**

[45 L. J. R., Ch. 56.]

The Court cannot order a contract involving issue of shares as fully paid up to be filed by the registrar *nunc pro tunc*, but may rectify the register by striking out the allotment, so that the shares may be re-issued after the registration of the contract.

In re **Dalgleish's Settlement.**

[45 L. J. R., Ch. 68; L. R., 1 Ch. Div. 46; on appeal, L. R., 4 Ch. Div. 143; and see *In re Rathbone*, 45 L. J. R., Ch. 531; L. R., 2 Ch. Div. 483; and *In re Crowe's Trusts*, L. R., 14 Ch. Div. 610.]

If the surviving trustee of leaseholds dies without personal representative, and new trustees have been appointed, the

Court will make an order vesting in them all the estate of the deceased trustee.

Moore v. Clench.

[45 L. J. R., Ch. 80; L. R., 1 Ch. Div. 447.]

An ordinary tenant for life, having power to grant leases in possession, may bind himself by covenant to grant a lease in reversion expectant on the determination of the subsisting term; but trustees cannot do this, for they cannot fetter a trust, which must only be exercised for the benefit of the estate.

If the covenant had been valid, the M. R. was of opinion that the Charity Commissioners ought to have sanctioned the renewal sought under sect. 29 of the Charitable Trusts Act, 1855. For where there is (as here there was) a valid contract before the Act, the approval should be given, and a judge would order it.

Jones v. Dangerfield.

[45 L. J. R., Ch. 161; L. R., 1 Ch. Div. 438.]

The 34 & 35 Vict. c. 43, s. 53, provides that no sum shall be recoverable for ecclesiastical dilapidations in respect of any benefice becoming vacant after the commencement of the Act, unless the claim be founded on an order made thereunder. Here, under sect. 34, after the incumbent's death, the archbishop's order was made, stating the repairs to be done and their estimated cost, for which the representatives of the late incumbent were declared liable. This case comes under sect. 36. The living is under sequestration. The sequestrator is not personally liable for the dilapidations, and is not entitled to deduct the cost of repairs from the profits of the benefice passing through his hands.

In re Wilcock's Settlement.

[45 L. J. R., Ch. 163; L. R., 1 Ch. Div. 229.]

This was, in the event which happened, an absolute gift of personalty to W., the illegitimate daughter of settlor. Immediately following the gift is this proviso: "And, if, any estate, interest, or benefit shall, under the . . . provisions hereof, be undisposed of, or, in the events which shall happen, would, but for this proviso, be held upon trust for the Crown, or belong beneficially to the Crown," then such estate, interest, and benefit should be held in trust for the settlor for life, and after his death for the petitioner. W. survived the settlor, and died intestate, whereupon the petitioner claimed the fund.

Held, that, as W. was absolutely entitled at her death, the limitation over was void for repugnancy, and that, consequently, the Crown was entitled.

If you give property absolutely, it must devolve according to law. "The law says that, if a man dies intestate, the real estate shall go to the heir, and the personal estate to the next of kin; and any disposition which tends to contravene that disposition which the law would make is against the policy of the law, and therefore void."

In re Broadwood's Settled Estates.

[45 L. J. R., Ch. 168; L. R., 1 Ch. Div. 438.]

A fund in Court representing land sold under the Leases and Sales of Settled Estates Acts, should not be paid out to a tenant in tail without the execution of a disentailing deed.

Lord Selborne's decision in *Re Butler's Will* (L. R., 16 Eq. 479) approved; V.-C. Malins's decision in *Re Rowe* (43 L. J. R., Ch. 347; L. R., 17 Eq. 300) not followed.

In re The Stockton Malleable Iron Co., Ex parte Chapman.

[45 L. J. R., Ch. 168; L. R., 2 Ch. Div. 101.]

The articles of association give a company a lien on the shares of any member for any "moneys due" to the com-

pany from him, and power to sell any shares registered in the name of such debtor to settle such debt, and to refuse to transfer such debtor's shares while the indebtedness remained.

Held, that "due" meant "payable at once," and therefore did not extend to a claim on bills of exchange which had not arrived at maturity. The question arose on the refusal to register the transfer of certain shares held by a shareholder, who had accepted a bill not then due, of which the company were indorsees for value.

It was not reasonable to suppose that the company meant to fetter the transfer of shares in which their lien had not arisen. The only object was to secure the lien.

The Albion Steel and Wire Co. v. Martin.

[45 L. J. R., Ch. 173; L. R., 1 Ch. Div. 580.]

The mere consent to become a director does not create a fiduciary relationship between the person consenting and the company. So to operate, there must be an acceptance of office after incorporation.

COMMENT.

And see *Pulbrook v. Richmond, &c. Mining Co. post.*

In re **Breed's Will.**

[45 L. J. R., Ch. 191; L. R., 1 Ch. Div. 226.]

The power of maintenance given by Lord Cranworth's Act (23 & 24 Vict. c. 145), s. 26, stops short at twenty-one. Where the Court is administering the parent's estate, it will, where the contingencies (affecting a class) are equal, and the adult children (if any) consent, give interest on presumptive shares of the infant children for their maintenance. But that is a rule of Court, and does not help trustees. I think, however, that with the consent of the widow (an annuitant out of the fund) the trustees may make advances out of capital to adult unmarried daughters under the power of advancement, for the words here, viz. "in or towards the advancement or placing out in life or otherwise for his or her

benefit," are wide, as I held in *Louther v. Bentinck*, ante, p. 50. The trustees may properly increase the allowance for each infant daughter, to meet the expenses of her education, for that is included in maintenance and support.

[And see *In re Cotton*, infra.]

In re The Carmarthenshire Anthracite Coal and Iron Co.

[45 L. J. R., Ch. 200.]

Secured creditors may appear on the hearing of a winding-up without then electing between resting on, or giving up, their securities.

In re Cotton.

[45 L. J. R., Ch. 201; L. R., 1 Ch. Div. 232.]

A doubt existed as to whether sect. 26 of Lord Cranworth's Act applied to a merely expectant interest, where the income was not indefeasibly vested.

Held, that it did so apply. It was passed to extend to all infants the benefit which, in *Chambers v. Goldwin*, 11 Ves. 1, and other cases, the Court had given to infants for whom a provision had been made contingently on their attaining twenty-one by parents or persons standing *in loco parentis* to them.

COMMENT.

See in *Buckley's Trusts*, L. R., 22 Ch. Div. 583. The testator incorporated the above s. 26 in his will. Fry, J., there lays down as to cases before the Act: —(1) As to a legacy to A. B. absolutely the accretions of income belonged to the legatee; (2) as to a legacy to A. B. contingently on attaining twenty-one, or on some other event, the accumulations would be taken or not according to the happening of the event; (3) as to a legacy absolute in the first instance, but liable to be defeated on a future event, the accumulations would go until the defeating event to the legatee. He thought the statute was not intended to alter this law, and, this being case No. 3, held the infants' representatives entitled to accumulations of income as against those entitled in remainder.

Burton v. Newbery.

[45 L. J. R., Ch. 202; L. R., 1 Ch. Div. 234.]

The testator, by will dated December 7, 1837, gave certain interests in his residuary real estate to A. and B., and ten others.

By a codicil dated October 12, 1838, he directed an after-acquired real estate to be held on the same trusts as his residuary real estate. A. and B. were attesting witnesses to this codicil.

The testator then (April 1, 1839) made a second codicil, and he described it as "*a codicil to my last will, dated the 7th of December, 1837.*" That was properly attested. It did not refer to the first codicil.

Sect. 15 of the Wills Act makes a gift to an attesting witness void.

It is said the effect of the second codicil is equivalent not only to the re-execution of the will, but also of the will and first codicil.

Now one testamentary instrument, properly attested, may incorporate any prior writing, whether properly attested or not, if the incorporation is so made as to indisputably point to the prior instrument so intended to be incorporated. In that case, such prior instrument becomes part of the later one. "If the codicil do refer to the will . . . it does 'set it up' . . . the mere fact of its being a codicil will not do; it must refer to the instrument" (Bayley, J., in *Doe v. Evans*, 2 L. J. R., Ex. 39; 1 Cr. & M. 42).

To confirm by a codicil an ill-executed writing, the testator must refer to the prior writing, so as to show that he intends it to be part of his testamentary disposition.

The second codicil refers to the will as bearing date on a certain day. That will not include instruments of a later date. It is said (1) the first codicil is part of the will; (2) the second codicil republishes the will; (3) therefore, it republishes the first codicil as part of the will. That is a fallacy. When you describe a will by date you do not include a subsequent codicil, though it may be that, when you refer to a will generally,

you may republish a codicil under it. [That is, without giving date or any details as to the will.]

The second point was this: the first codicil gave certain after-acquired lands on the same trusts as the residue of the real estate. You read the words of reference as if the limitations to which they refer were incorporated in the gift (*Christie v. Gosling*, 35 L. J. R., Ch. 667; L. R., 1 E. & I. App. 279). The share of each attesting witness falls into the residue. It was said the residuary donees cannot take under the first codicil without effectuating its provisions. That is not so. They take what is ineffectually given. The Court looks only to the effect of the codicil under the statutory provision, and reads the codicil as if the persons incapacitated from taking were not named in it as objects of bounty at all. Their shares fall into the residue.

The M. R. disapproved of *Gordon v. Lord Reay*, 5 Sim. 274.

COMMENT.

See *Follett v. Pettman*, L. R., 23 Ch. Div. 337, and cases there cited.

—◆—
D'Eyncourt v. Gregory.

[45 L. J. R., Ch. 205; L. R., 3 Ch. Div. 635.]

Under the ordinary name and arms clause the surname to be adopted must be used either alone or in addition to and after the original surname, and not before it.

—◆—
Sargant v. Read.

[45 L. J. R., Ch. 206; L. R., 1 Ch. Div. 600.]

In a partnership suit, a receiver may now be appointed at the instance of a defendant.

—◆—
In re The Patent Cocoa Fibre Co.

[45 L. J. R., Ch. 207; L. R., 1 Ch. Div. 617.]

A creditor, who had presented a winding-up petition, elected to have it dismissed at the hearing. Held, that creditors who had not been served, but appeared, in con-

sequence of the advertisements, to oppose, were entitled to the costs of appearance.

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In re Holt's Estate, Bolding v. Strugnell.

[45 L. J. R., Ch. 208.]

A gift of personal estate to a class or an individual at twenty-one, or on attaining twenty-one, or when, or as, or if, they or he attain twenty-one, standing alone, is a contingent bequest; but, if followed or preceded by a gift of the whole income for the absolute benefit of the legatee in the meantime, it is then a vested gift.

Spencer v. Wilson, 42 L. J. R., Ch. 754; L. R., 16 Eq. 501, disapproved.

COMMENTS.

The direction as to application of income was thus in this case: "The interest, dividends, and annual produce of the fund to be paid and applied for and towards his, her, or their respective maintenance and education until he, she, or they should respectively attain the age of twenty-one years." Another decision of the M. R. upon this matter is *Fox v. Fox*, L. R., 19 Eq. 286, which, in effect, was an overruling of *Pulsford v. Hunter*, 3 Bro. C. C. 416, and *In re Ashmore's Trusts*, 39 L. J. R., Ch. 202; L. R., 9 Eq. 99. *Fox v. Fox* was commented on at length by V.-C. Hall in *In re Grimshaw's Trusts*, 48 L. J. R., Ch. 399; L. R., 11 Ch. Div. 406, and, by the same judge again, in *Dewar v. Brooke*, 49 L. J. R., Ch. 374; L. R., 14 Ch. Div. 529. In *Fox v. Fox* the first trust was of the capital fund, with a superadded provision for maintenance. The V.-C. said he could understand that, in such a case, although the words were "or so much thereof respectively as the trustees might think proper," it might be considered that there was, in substance, a gift of the whole income, with a mere authority to the trustees to reduce the maintenance. Moreover, in *Fox v. Fox*, the maintenance clause did not describe the child as a child entitled only in expectancy, as was the case in *Dewar v. Brooke*. The word in *Fox v. Fox* was "presumptive."

There being diverse decisions of eminent judges of first instance, it is desirable that the rule should be settled by an Appellate Court. If *Fox v. Fox* be followed (as it is conceived it should be), after the rule as above stated may be added the words "although a discretionary power is given to the trustees to apply only a part of such income for the purposes named."

Metcalf v. Hutchinson.

[45 L. J. R., Ch. 210; L. R., 1 Ch. Div. 591.]

Where there is a trust "to pay" or "raise and pay" or "raise or pay," a gross sum out of rents and profits, that means out of the estate, the reason being that the sum is to be paid at once, and the rents and profits are not sufficient for the purpose. The testator has really two intentions—(1) an intention to pay a gross sum, and (2) to pay it out of rents and profits. So far as they are inconsistent, the first prevails.

This rule applies with greater force when the gross sum is to be raised to pay debts.

Court v. Buckland.

[45 L. J. R., Ch. 214; L. R., 1 Ch. Div. 605.]

Cases considered in which a residuary bequest of personal estate by way of trust will include the proceeds of sale of real estate. The will was so special that a note of the case is not of sufficient general importance for insertion.

In re Haycock's Policy.[45 L. J. R., Ch. 247; L. R., 1 Ch. Div. 611; and *Matthew v. The Northern Assurance Co.*, 47 L. J. R., Ch. 562; L. R., 9 Ch. Div. 80.]

An insurance company is an ordinary debtor, and not a "trustee" within the provisions of the Trustee Relief Acts, &c.

As such, if the company dispute the title of the policy-holder, and defend an action to recover on it, and are defeated, they must pay costs like ordinary debtors.

COMMENT.

If, however, a petition is filed by the person entitled to payment out for such payment, that amounts to a submission to the jurisdiction under the Trustee Relief Act, and the costs of payment in will be allowed to the company (*Haycock's Policy, supra*, and *In re Sutton's Trusts*, L. R., 11 Ch. Div. 175; 48 L. J., Ch. 350). A banking company subjected to conflicting claims as to a deposit with them is not entitled to pay in under the Act (*Sutton's Trusts, supra*.)

In re **The Marquis of Salisbury.**

[On appeal, 45 L. J. R., Ch. 250; L. R., 2 Ch. Div. 29.]

Under the Places of Worship Sites Act, 1873 (36 & 37 Vict. c. 50), s. 1, a father, tenant for life, is the guardian of his infant son, tenant in tail in remainder, to concur under the above Act in the grant of a site for a church.

The M. R. held otherwise, being of opinion that the statute intended that there should be some check upon the tenant for life. Baggallay, L. J., agreed with him in this view; but James, L. J., Mellish, L. J., and Blackburn, J., held as above.

The M. R. held that the Court had no power to appoint a guardian under the Act. In this James, L. J., Mellish, L. J., and Blackburn, J., agreed; but Baggallay, L. J., thought the Court might appoint such a guardian.

Bagshaw v. The Buxton Local Board of Health.

[45 L. J. R., Ch. 260; L. R., 1 Ch. Div. 220; 40 J. P. 197.]

In 1858 the owner of a house abutting on a highway wrongfully enclosed a portion of the highway as a garden.

In 1873 the local board of health, acting under sects. 69 and 70 of 10 & 11 Vict. c. 34, served a notice on the occupier to remove the obstruction of the fence around this part so taken and restore it to the highway; and stating that, in default, the work would be done at his expense.

The owner brought this suit for an injunction to restrain the board from so doing. Held, that he must fail.

The piece of land in question was, I am satisfied, part of the highway. The Court decides that question.

At common law any one specially injured may remove an obstruction on a highway, but not otherwise.

A public body having proper jurisdiction has a right to prostrate on reasonable notice. It would, therefore, be absurd to decide that I ought to enjoin against the removal of what I am satisfied is an obstruction. The Statute of Limitations would not apply to a public injury of this kind.

COMMENT.

It is well settled now that even justices, who have ordinarily no jurisdiction to try any civil rights relating to property, or where a *bonâ fide* claim of right is made, may decide the question, "highway or no highway," or "street or no street," where that question is necessarily involved in the matter before them.

Underhill v. Roden.

[45 L. J. R., Ch. 266; L. R., 2 Ch. Div. 474.]

Approval of the rule "that, when a testator gives to a woman a life interest, if she so long remains unmarried, and then directs that, in the event of her marrying, the property shall go over to another, although in strict language the gift over is expressed only to take effect in the event of the marriage of the tenant for life, the gift over is held to take effect, even though the tenant for life does not marry" (*Eaton v. Hewitt*, 2 Dr. & Sm. 184). "It is extended by implication so as to take effect on the determination of the woman's estate by death."

Pile v. Salter, 5 Sim. 411, disapproved.

The Malmesbury Railway Co. v. Budd.

[45 L. J. R., Ch. 271; L. R., 2 Ch. Div. 117; and *Beddow v. Beddow*, 47 L. J. R., Ch. 588; L. R., 9 Ch. Div. 89.]

The Court may restrain, by injunction, an arbitrator who is proceeding corruptly from taking the reference further. (*Beddow v. Beddow* is given separately, *post.*)

Worraker v. Pryer.

[45 L. J. R., Ch. 273; L. R., 2 Ch. Div. 109.]

A creditor cannot have judgment for the administration of real estate unless he sue "on behalf of all creditors."

COMMENTS.

This case was followed in *In re Royle, Fryer v. Royle*, L. R., 5 Ch. Div. 540; but V.-C. Hall decided otherwise in *Cooper v. Blissett*, 45 L. J. R., Ch. 272; L. R., 1 Ch. D. 691.

Per the M. R.: V.-C. Giffard probably only meant in *Ponsford v. Hartley*, 2 Jo. & H. 736, that, if the writ had been wrongly indorsed, leave to amend it and the bill, so as that the action might have been on behalf of all the creditors, would have been given.

Appleton v. The Chapel Town Paper Co.

[45 L. J. R., Ch. 276.]

If two owners of distinct properties join as plaintiffs in a suit to restrain a nuisance, this is a misjoinder; but, by consent, in this case the M. R. heard the actions as if distinct bills had been filed.

In re Caplen's Estate, Bulbeck v. Silvester.

[45 L. J. R., Ch. 280.]

A testatrix to whom S. owed 300*l.* on promissory note, payable on demand, verbally directed S. to pay, after her death, the interest to her sister for life, and afterwards to divide the principal among her sister's children. This S. agreed to do. S. died without having demanded the amount due on the note, which was found amongst her papers at her death, uncanceled.

Held, that there was no valid trust.

At law the testatrix remained owner of the note, there having been no demand in her lifetime.

A mere agreement by a debtor to apply the money according to the direction of the creditor will not do. There is nothing here to show that the owner of the note intended to part with her legal title to the money.

Peek v. The Trimsaran Coal, &c. Company.

[45 L. J. R., Ch. 281; L. R., 2 Ch. Div. 115.]

In a proper case the Court will appoint a receiver and manager of the property of a limited company on interlocutory application. The plaintiff was the holder of a debenture bond of the company. The doubts as to the power so to appoint were suggested by the cases of *Tripp v. The Chard Rail. Co.*, 22 L. J. R., Ch. 1084; 11 Ha. 241; and *Gardner v. The London, Chatham, and Dover Rail. Co.*, 36 L. J. R., Ch. 323; L. R., 2 Ch. Div. 201.

Middleton v. Pollock, Ex parte Elliott.

[45 L. J. R., Ch. 293; L. R., 2 Ch. Div. 104.]

E. placed with her solicitor a sum for investment. The solicitor died insolvent, without investing the money. After his death a declaration of trust was found amongst his papers, whereby he declared himself to be trustee for E. of some leasehold property, of which he was mortgagee, and also of a bill indorsed by himself to E.

Held, as between E. and the general creditors of the solicitor's estate, that the transaction was valid within 13 Eliz. c. 5.

So held, although the M. R. thought that, at the time he executed the above declaration, the solicitor knew his own insolvency, and E. was a relative of the solicitor, as were others for whom he made similar provisions.

In order to invalidate, under 13 Eliz. c. 5, it must be shown that the declaration was not given for good consideration or *bonâ fide*.

The bankruptcy law alone, to a limited extent, prevents the preference of one creditor. Here there was no bankruptcy. It has been decided that a payment is *bonâ fide* within the statute, although both the persons paying and receiving knew of the insolvency.

Foster v. Foster.

[45 L. J. R., Ch. 301; L. R., 1 Ch. Div. 588; and *Mildmay v. Quicke*, 46 L. J. R., Ch. 667; L. R., 6 Ch. Div. 553.]

My decision in *Steed v. Preece*, 43 L. J. R., Ch. 687; L. R., 18 Eq. 192, was merely that, *if a conversion were rightfully made*, all the consequences of conversion must follow, unless there were an equity of the heir-at-law or some other person to have the property treated as unconverted. The equity in the above case (*Foster v. Foster*) was contained in the sections of the Leases and Sales of Settled Estates Act, which provide that the property of infants sold under that Act shall still be regarded as real estate. Of course, in that case there is no conversion.

In *Mildmay v. Quicke* a married woman was party to a partition suit, as entitled to a share of real estate, in which her husband had also a joint life estate and an estate by the curtesy. Then, in her lifetime, a decree for sale was made. It was then arranged that the plaintiff should buy the married woman's share; and under an order he paid 1,200*l.*, the purchase-money, into Court. The plaintiff paid the purchase-money, but, before any conveyance, the married woman died.

Held, that the purchase-money must be treated as real estate.

**In re St. Thomas's Dock Co.**

[45 L. J. R., Ch. 304; L. R., 2 Ch. Div. 116.]

This is a creditor's petition to wind up. I have an impression it is not *bonâ fide*. The object of a petition is payment. This company has not a shilling in the world, except a dock, with some concessions, which are vested in trustees upon trust for debenture holders, who have a first charge on the property. Then other holders have a second charge, under the trusts. It is not suggested that a sale would more than pay these preferential creditors. Therefore, no money could come from a winding-up order. I agree "that if a

creditor cannot get paid without winding up, it is *ex debito justitiæ* that he should have a winding-up order" (Lord Selborne, 43 L. J. R., Ch. 184); but that means when he can get something under the winding up—when there is some chance of it. Here there are not even assets enough to pay costs. Petition ordered to stand over, on proper undertakings to prevent the petitioner from being injured, and losing his first right to petition, meantime.

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***In re* The Arthur Average Association.**

[45 L. J. R., Ch. 346; L. R., 3 Ch. Div. 522.]

An unregistered mutual marine insurance association was ordered to be wound up in February, 1870. Eighty persons were settled on the list of contributories, and a certificate of the chief clerk showed (December, 1873) that about 500*l.* were due to outside creditors for goods supplied prior to the winding up, and upwards of 17,000*l.* to policy holders. Two years afterwards, in consequence of the decision of the M. R. that the policies were void in law, all proofs on them were expunged. The official liquidator proposed to make a call of 135*l.* per contributory, to pay the outside debts and costs of winding up, amounting to about 7,000*l.*, and chiefly incurred in calculating what was due on policies now declared void. Held, that, the outside debts being apparently debts of the association, there was an equal liability to contribute, and in the proportions asked by the liquidator.

Observations on *The London Marine Insurance Association*, 38 L. J. R., Ch. 681; L. R., 4 Ch. Div. 611.

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**The Wimbledon and Putney Commons Conservators
v. Dixon.**

[45 L. J. R., Ch. 353; L. R., 1 Ch. Div. 362 (appeal affirming the M. R.).]

The rule of law is that the use of a road to a farm for farming purposes, for any number of years, does not give

the right to use the road for the extra purposes occasioned by having turned the farm into a small town or series of houses.

The injunction against the user of the road went, "except for the purposes for which the land has been heretofore applied."

Observations on *Cowling v. Higginson*, 7 L. J. R., Ex. 265 (judgment of Parke, B.); 4 M. & W. 245; *Williams v. James*, 36 L. J. R., C. P. 256; L. R., 2 C. P. 577 followed.

Hirsch v. Jonas.

[45 L. J. R., Ch. 364; L. R., 3 Ch. Div. 584.]

H., a London cigar seller, had a correspondent in Havannah called G., from whom, as manufacturer, H. bought. In 1869 H. got a design which he asked G. to adopt. He registered it here at Stationers' Hall. G. did so adopt the design. All the public can see is that the cigars are those of G. There is no contract that G. will not supply cigars under this label to others. The action was brought to restrain G. from selling to other persons with this label. No injunction would be granted on interlocutory application, and none at all until such a contract as above was proved.

Vane v. Vane.

[45 L. J. R., Ch. 381; L. R., 2 Ch. Div. 124.]

Although the property of a lunatic (not so found) be less than that mentioned in the Lunacy Regulation Act, 1862 (sect. 12), the Court has, by its innate jurisdiction, power to make orders for the custody and maintenance of the lunatic, but will not do so if it is probable that a commission of lunacy will be issued.

Hodgson v. Jex.

[45 L. J. R., Ch. 388 ; L. R., 3 Ch. Div. 122.]

There was a gift of "all my furniture, plate, linen, and other effects that may be in my possession at my death" to a sister for life, and after her decease to the "children of my dear brother A. H." There was no other gift of general personal estate.

Held, that the general personalty—which consisted of articles specifically mentioned, wearing apparel and jewellery, cash, sums due on notes, and a sum at the savings bank—passed under this bequest. Here, again, it was suggested that the personalty to pass must be *ejusdem generis* with furniture, &c. The M. R. asked what would be so, and observed on the fact that it is only in consequence of the authorities that these cases come before the Courts.

In re The New Buxton Lime Company, Duke's Case.

[45 L. J. R., Ch. 389 ; L. R., 1 Ch. Div. 620.]

The signing of a memorandum of association is only conclusive as regards the quantity, and not as to the quality of shares to be taken. The quality may be afterwards varied by arrangement.

Fowler's Case, 42 L. J. R., Ch. 9 ; L. R., 14 Eq. 316, doubted, although distinguishable.

In re Venour's Settlement ; Venour v. Selon.

[45 L. J. R., Ch. 409 ; L. R., 2 Ch. D. 522.]

The Court has no power, under sect. 14 of the Leases and Sale of Settled Estates Act (19 & 20 Vict. c. 120), to charge mortgage or sell a portion of a settled estate, in order to raise money for the purposes mentioned in it. Where there is a fund arising from the sale of land either under this Act or the Lands Clauses Consolidation Act, the Court will not allow

the fund to be diverted from the purposes to which, according to sects. 23 and 69, it ought to be applied, except for the single object of erecting buildings on the settled estate.

[See new provisions of the Settled Estates Act, 1882.]

Broder v. Saillard.

[45 L. J. R., Ch. 414; L. R., 2 Ch. Div. 592.]

This case again illustrates the rule that, in respect of a temporary nuisance, the occupier must be joined as plaintiff.

The complaints were (1) of damp and stable drainage and sewage from broken soil-pipe oozing through to plaintiff's house, which was on a lower level than the newly-erected stable which caused the nuisance; and (2) noise of horses.

I consider the dampness as arising from contiguity of made earth put by defendant's predecessors in title, the extent being increased by the broken soil-pipe. Part of the wet comes from washing the horses, and so on. I think the defendant liable for the nuisance.

The evidence as to the noise is that it is a nuisance. I think the plaintiff entitled to an injunction to restrain the defendant from keeping or suffering any horses to be in his stable so as to cause a nuisance, and to a declaration that he must prevent the damp from going through the plaintiff's flank wall.

In re Jones's Will.

[45 L. J. R., Ch. 428; L. R., 2 Ch. Div. 362.]

The covenant in this marriage settlement provided that any property to which the wife, or the husband in her right, should at any time or times during the coverture become beneficially entitled, in possession or reversion, or in any manner whatever, derivable directly or indirectly from M. J., should be settled on the trusts of the settlement. Such settlement only in the first instance itself included the wife's

interests under the will of the said M. J., other than any interest in sums thereby bequeathed in trust for one S. F. for life. The question arose as to a share of the fund in which this life interest had existed.

The tenant for life outlived the wife. As this was so, it is clear that no title accrued to her during the coverture. Nor can it be averred that the husband took any interest during the coverture, for he was only entitled as her administrator. The inchoate title is really no title at all. It is not property to which either "became entitled during the coverture."

In re Viant's Settlement Trusts, 43 L. J. R., Ch. 832; L. R., 18 Eq. 436, disapproved.

[See *Cornmell v. Keith*, L. R., 3 Ch. Div. 767; 45 L. J. R., Ch. 689.]

Hampson v. Price's Patent Candle Co.

[45 L. J. R., Ch. 437.]

Reasonable gratuities to workmen held not *ultra vires*, but within discretionary powers of management given by sect. 90 of the Companies Clauses Consolidation Act, 1845 (8 Vict. c. 16).

COMMENT.

But gratuities are only allowable when the company is a going concern, and with reasonable reference to a beneficial effect upon the company as such. *Hutton v. West Cork Rail. Co.*, L. R., 23 Ch. D. 654.

***In re* The International Pulp and Paper Co.**

[45 L. J. R., Ch. 446; L. R., 3 Ch. Div. 594.]

The Court which has made the winding-up order has jurisdiction, by sect. 87 of the Companies Act, 1862, to restrain any action in any part of the United Kingdom against the company. Such orders may be enforced under sect. 122 in all other parts of the United Kingdom.

***In re* Muirhead, *Ex parte* Muirhead.**

[45 L. J. R., Bank. 65; L. R., 2 Ch. Div. 22.]

[The M. R. was here sitting as a member of the Appeal Court, and joined in this decision.]

Damages recovered in a divorce suit, although ordered to be paid to the petitioner, he undertaking to pay same into Court, do not constitute a debt due to the husband, so as to found a good petitioning creditor's debt.

COMMENT.

The reason is that to found a petition on it a debt must be presently enforceable, or exigible, whereas the above damages have to be paid into the Registry, and are subject to the jurisdiction of the Court. The validity of the order for payment to petitioner is, notwithstanding *Patterson v. Patterson*, L. R., P. & D. 189; 40 L. J., P. & M. 5, doubtful (per Judges, *sup.*).

In re Caughey, Ex parte Ford.

[45 L. J. R., Bank. (App.) 96; L. R., 1 Ch. Div. 521.]

If the appellant in this case is to succeed, it must be either on the general doctrine of equity that a man having a charge on property cannot stand by and allow another person to advance money on it supposing it to be unencumbered, or on the bankruptcy doctrine of reputed ownership. In the first case suppression of the facts is assumed. Thus the owner of land cannot stand by and allow another to build on it as if it were his own; but you must, of course, fix such owner with knowledge that the other was proceeding on the false assumption.

As to the "reputed ownership," sect. 15 of the Act uses the words "consent and permission," implying knowledge, and I think they also imply that there must be a voluntary allowance, on the part of the true owner, of that mode of dealing with the property. *Laches* on the part of creditors will not be equivalent to a consent to what the debtor may do with his property.

The dictum of V.-C. Wood in *Re Rawbone's Will*, 3 K. & J. 476; 26 L. J. R., Ch. 588, contains only an inaccurate reference to the decision in *Troughton v. Gitley*, Amb. 630, and was not really intended to extend the above rules.

COMMENT.

The Bankruptcy Act, 1883 (see s. 44 (iii.)) contains similar language.

In re Hendrey, Ex parte Crump.

[45 L. J. R., Bank. 98; L. R., 1 Ch. Div. 530.]

The trustee is not bound to administer written questions to a bankrupt; nor is a registrar (sitting as chief judge) warranted in so requiring, or in adjourning the examination for the purpose, on the ground that in his opinion public time was being wasted by the oral examination.

Anderson v. The British Bank of Columbia.

[45 L. J. R., Ch. (App.) 449; L. R., 2 Ch. Div. 644.]

A communication is confidential if intended for submission to a professional man; but a communication between a principal and agent, after litigation threatened, not so made, is not privileged. The object of the rule allowing the privilege is that a full disclosure should take place as between the client and his adviser.

V.-C. Stuart's dicta in *Ross v. Gibbs*, 39 L. J. R., Ch. 61; L. R., 8 Eq. 522, are hasty generalisations of the doctrine, and somewhat in error.

In re The British, Colonial, and Foreign Property Insurance Corporation (Stephenson's Case).

[45 L. J. R., Ch. 488.]

Article of Association 54 was: "No person shall be eligible for election in future as a director unless he shall hold in his own right at least fifty shares in the company;" and Article 72 was: "The office of director shall be vacated if he cease to hold the requisite number of shares in the company." A person elected and acting as a director without taking any shares is liable, in the winding-up, for the qualification number of fifty. The case is undistinguishable from *Lord C. Hamilton's Case*, 42 L. J. R., Ch. 465; L. R., 8 Ch. Div. 548.]

The Singer Manufacturing Company v. Wilson.

[45 L. J. R. 490 (on appeal); and in H. L., 47 L. J. R. 481;
L. R., 3 App. Cases, 376.]

[The Court of Appeal, in this well-known case, agreed with the M. R. on all points. The House of Lords remitted the case for a rehearing, laying down the following principle.]

In order that a manufacturer who seeks to use a name of another manufacturer in the description of his goods can justify such user, he must show that the name merely describes, and is, by the public, understood to describe, only the *genus* of the article—*i.e.* that it is of a certain *genus* in type, structure, and arrangement of detail, and is not the sign or mark of a special maker. The fact that the name only appears in advertisements or price lists, or that the selling manufacturer's own name and trade-mark appear on the labels and in the advertisements, &c., will not affect this principle.

The Lord Chancellor and Lord O'Hagan were of opinion that it was not necessary to prove fraud in order to obtain protection for a trade-mark. Lord Blackburn doubted as to this.

COMMENT.

As to the effect of registration, see now 46 & 47 Vict. c. 57, ss. 75, 76 & 77.

**Cook v. Enchmarsh.**

[45 L. J. R., Ch. 504; L. R., 2 Ch. Div. 111.]

Leave was given in this case, under Order XVII., Rule 2, to join with an action for recovery of land a claim to delivery of a deed under which the defendant claimed.

[This leave should be obtained before issue of writ (*In re Pilcher, Pilcher v. Hinds*, L. R., 11 Ch. Div. 905; 48 L. J. R., Ch. 587). A foreclosure action is not an "action to recover land" within the rule, which is the equivalent for the old action of ejectment; neither is an action for a declaration of title to land (*Tawe v. The Slate Company*, L. R., 3 Ch. Div. 629; *Gledhill v. Hunter*, L. R., 14 Ch. Div. 492; 49 L. J. R., Ch. 333).]

Sugden v. Lord St. Leonards.

[45 L. J. R. (App.), P. D. & A. 49; L. R., 1 P. Div. 154.]

The M. R.: The law requires satisfactory proof of attestation and execution of a will. Destruction of the will, with intent to revoke, must be proved in order to get rid of the will itself. But, if you trace the will to the testator, and it is not forthcoming at his decease, and there is no evidence as to what has become of it, that state of facts raises a sufficient presumption of law that it was destroyed with intent to revoke. Of course this can be rebutted, and by oral evidence. The testator here believed that he had left a will disposing of all his property.

The next point is that there is here no oral evidence of the contents of the whole of the will. The witness (Miss S.) forgets part of it. First as to personalty—It was said: “If proved that legacies were omitted, then, by granting probate of a will which disposes of the residue, you are giving a larger portion to the residuary legatee than was intended; therefore, you are not only not performing, but perverting, the intention of the testator.” That is a fallacy. It turns on the word “intention.” A testator has in this respect two intentions: (1) that his legatee shall take the legacy; (2) that, if he cannot, it shall not go to the next-of-kin but to the residuary legatee. Why should we not effectuate the secondary, if we cannot effectuate the primary, intention? The Wills Act gives this effect to residuary devises and bequests.

If a candle or a chemical liquid fell on part of a will and rendered that part undecipherable, would not probate go as to the rest? The case is the same. There the primary intention must fail. There is no distinction where the obliteration is from the tablets of the memory, so to speak, of the witness, whose testimony is admitted as secondary evidence. In many cases, ancient and modern, probate has been granted of parts of a testamentary instrument—thus, of a codicil or of codicils when a will was lost.

As to real estate—Sections 62 and 63 of the Probate Act enable the Probate Division to do what the Court of Chancery

could always do—establish a will of real estate against the heir by proof in solemn form. In ancient times separate wills were made, not only of real and personal estates, but also several wills of real estate. If a testator made a separate will of personalty, then you could not, even under the Probate Act, have gone to the Probate Court, but you must still have had recourse to Chancery to establish the will as regards real estate. If it would have been right to establish a will in Chancery it would be equally right to grant probate *quoad* real estate. Before the Probate Act you could have got proof of a devise to the plaintiff in ejectment without proving the other devises in the will. If he could prove the devise to him, it was immaterial whether the rest of the will had been partially destroyed, *e.g.* eaten by rats (as in one case), or destroyed by fire, or torn up.

Then, secondary evidence is admissible—its very meaning is to supply the loss of primary evidence arising from accident or otherwise. But for *Wharram v. Wharram*, 33 L. J. R., P. & M. 75; 10 Jur. (N.S.) 75 (with which we do not agree), there would be no doubt. Equity always relieved against the loss of a deed by allowing secondary evidence of it, and there is no distinction between this and a will.

Then what secondary evidence is admissible? There is the evidence of a person who had seen the will, and that may be corroborated by declarations of the testator made to that witness or to other persons, and these declarations may be extended to such as were made as well before as after the will.

(1) Declarations accompanying an act are admissible. (2) Declarations against interest. (3) Declarations in the course of business, which it was a duty to make, form the three large exceptions to the rule against admitting declarations. The smaller are (4) matters of public and general interest—*i.e.* of *quasi*-historical interest not actually historical, where persons whose declarations are admitted may be presumed to have been accurate; (5) declarations of deceased members of a family as to matters of pedigree.

The principle underlying all the exceptions is the same;

there must be difficulty in obtaining other and better evidence, forming the ground for the original admission. The declarant must be disinterested in the sense that his declaration was not made in favour of his interest ; and the declaration must have been made before the dispute or litigation ; and the declarant must have had peculiar knowledge. That appears to me the strongest ground for admitting it. All these reasons exist in the case of a testator declaring the contents of his will. As to the declarations made before execution they are admitted on the ground of probability ; the cogency depending on nearness of time to the period of execution.

The will, as in this case written down by Miss Sugden from memory, was thus admitted to probate, all the circumstances showing the truth of the matter as stated by her, and the reasonableness of the will.

Quick v. Quick, 33 L. J. R., P. & M. 146 ; 3 Sw. & Tr. 442.

Plimpton v. Malcolmson.

[45 L. J. R., Ch. 505 ; L. R., 3 Ch. Div. 531, expressing dissent from *Betts v. Neilson*, L. R., 3 Ch. 429 ; 37 L. J., Ch. 321.]

As far as I know, there is no law which says that, if a man from abroad communicates an invention to A., who communicates to B., B. may not take out the patent. The Act on which all these patents are founded says that, in order to come within the exception of the Statute of Monopolies (21 Jac. I. c. 3), the person to whom the patent is granted must be the first and true inventor. In the legal sense it is decided that he is such if the invention, in other respects novel and useful, was not previously known in this country —*i. e.* was not part of the common or public knowledge of the country. If there were two simultaneous inventions, it was decided that the one who first took out the patent was the first and true inventor. If one man had, in fact, first invented, but had not taken out a patent, and had not communicated his invention so as to make it part of the public stock of information, the man who first took out the patent was also held to be the first and true inventor. What

is meant by public disclosure is disclosure in the trade connected with the manufacture; that is, that the trade has commonly used it. A modern specification enrolled in the Patent Office, or a description printed and published in England, will do. The judge has to decide what is sufficient publication. The description contained in a book must be equivalent to a specification. A sufficient specification must be such as is intelligible to the ordinary workman using the amount of skill and intelligence which may be fairly expected from him. The specification ought to tell such a workman how to make the invention, but not every detail—enough to enable him to make the invention work.

COMMENT.

See 46 & 47 Vict. c. 57, Part II.

◆

In re The Metropolitan Bank, and In re The Vendor and Purchaser Act, 1874.

[45 L. J. R., Ch. 525; L. R., 2 Ch. Div. 366.]

Sub-sect. 6 of sect. 133 of the Companies Act (25 & 26 Vict. c. 29) provides that, where there are several liquidators appointed generally, their powers cannot be exercised by less than two. On the death of one, therefore, a new liquidator must be appointed under sect. 140.

◆

In re The Percy and Kelly Mining Co.

[45 L. J. R., Ch. 526; L. R., 2 Ch. Div. 531.]

A defendant or respondent cannot be ordered to give security for costs. The rule providing for such security only applies to a person who initiates any suit or proceeding as plaintiff.

◆

The North British and Mercantile Insurance Co. v. The London, Liverpool, and Globe Insurance Co.

[45 L. J. R., Ch. 548; affirmed on appeal, 46 L. J. R., Ch. App. 537; L. R., 5 Ch. Div. 569.]

The liability of a wharfinger for safe custody is (in the absence of express stipulation) just the same as that of a

carrier. If goods are destroyed by fire he is liable for breach of duty. It is negligence not to have prevented the fire. B. & Co., wharfingers, had a large lot of grain of R. & Co. and some of their own at their wharf. R. & Co. insured against fire, and also had their remedies against B. & Co., and B. & Co. insured the grain also with other companies.

The question is (a fire causing great loss having occurred) whether the companies who are liable on the merchants' policies (R. & Co.'s) are liable to contribute anything to the amount of that loss, which the wharfinger's policies alone are more than enough to cover. Both sets of policies were subject to the conditions of average, as well as to the following condition: "If at the time of any loss or damage by fire happening to any property hereby insured there be any other subsisting insurance or insurances, whether effected by the same or any other person, covering the same property, this company shall not be liable to pay more than its rateable proportion of such loss or damage." All parties were solvent.

Held, that the grantors of the merchants' policies were not liable to contribute: For

B. & Co. (the wharfingers) were the parties primarily liable, and if the grantors of the merchants' policies had to pay to their assured merchants, such grantors might recover over against B. & Co.; and the condition applied only to two or more insurances to the same assured person on the same property, and not to separate insurances made on separate interests in the same property.

Lysaght v. Edwards.

[45 L. J. R., Ch. 554; L. R., 2 Ch. Div. 490.]

When there is a valid contract for sale, by which is meant such a contract as is sufficient in form and substance, so that there is no ground for setting it aside as between vendor and purchaser, the legal estate passes under a general devise of estates vested in the testator (vendor) as trustee (see now the provisions of the Conveyancing and Law of Property Act, 1881 and 1882).

In re Dowling's Trusts.

[45 L. J. R., Ch. 568.]

On a petition by a tenant for life for *interim* investment of purchase-money of a settled estate, such purchase-money having been paid into Court under the Lands Clauses Act, it is not necessary to serve the trustee or remainderman; nor will costs, occasioned by such service, be allowed.

[And see *In re Morris's Settlement*, 45 L. J. R., Ch. 63 (V.-C. Hall); L. R., 20 Eq. 470, where the V.-C. said that it was not necessary, on such a petition as the above, to serve persons having charges on the inheritance prior to the life estate of the petitioner.]

Southwell v. Bowditch.

[45 L. J. R., Q. B., C. P., and Exch. 630; L. R., 1 C. P. Div. 374 (Appeal).]

A broker delivered to the plaintiffs a note, as follows: "Messrs. Southwell,—I have this day sold, by your order and for your account, to my principals five tons of anthracene, payment in cash in fourteen days after delivery, less 2½ per cent. discount, and 1 per cent. brokerage.—W. A. Bowditch."

Was there a personal liability of Bowditch on this note?

The M. R.: In the absence of usage, mercantile contracts are construed like all others—the construction which they literally and grammatically bear is adopted unless the context or subject-matter shows that it should not be so adopted. This contract plainly shows that the defendant was merely acting *quà* broker, or agent. That does not conclude the question; for, a man may act as broker, and yet be personally liable in two cases—(1) by means of some words appearing on the contract, or (2) by implied or understood contract arising from usage of trade. As to (1), there is nothing here equivalent to "I bind myself personally," or "I buy from A. B. so as to make myself liable, though my principal may also be liable."

The argument by differentiation is vicious as applied to documents. You begin by saying, "This differs very little from that held in another case to bind personally," and then you cite another case where there is another difference, and so on, until you arrive at a totally different contract. As to usage, none was proved.

In *Humphrey v. Dale*, 26 L. J. R., Q. B. 137; 27 L. J. R., Q. B. 390; E. B. & E. 1004, the decision seems to be that usage can be admitted to prove a liability, though the contract does not show liability. The difference of opinion depended on this—the Statute of Frauds required a writing, and the usage would not be contradictory to the contract (for then it would not bind), but explanatory of it. The judges were divided as to whether the usage was explanatory or contradictory. Some judges said the evidence of usage was additional; but pure addition is not explanation, but a new contract. What might have been said is, that though, in an action on the writing, evidence of the usage would not be admissible to contradict because it would be additional, yet the distinct contract implied by usage might still be available to charge the defendant—that is, reducing it to a mere question of pleading.

The Swansea Shipping Co. (Limited) v. Duncan and Others.

[45 L. J. R., Q. B. &c. 638; L. R., 1 Q. B. Div. 644.]

Under Rule 18, Order XVI. (Judicature Act, 1875), where a defendant applies to serve a notice on a person not a party, he need not show that his claim against such person is identical or co-extensive with the claim against himself. If it is *prima facie* shown that one or more of the questions will be the same between the two sets of opponents, the above course is right, as Rule 21 enables the judge to adjust all details. Notice under Rule 18 may be served out of the jurisdiction.

Bustros v. White (App.)

[45 L. J. R., Q. B., &c. 642; L. R., 1 Q. B. Div. 423.]

As to the production of documents, the Judicature Act and its orders and rules give no greater power than that possessed by the Court of Chancery under 15 & 16 Vict. c. 86, s. 18, as judicially interpreted prior to the Judicature Act. If, by consent, documents are submitted to a judge in chambers, his decision as to whether they are privileged is final.

Maden v. Taylor.

[45 L. J. R., Ch. 569.]

Under the law, before the Wills Act of 1838, an indefinite devise to trustees gave the fee. I think the true reason was that the rule by which an indefinite devise was construed to pass a life estate only was contrary to the real intention. Here the trustees take an undoubted fee in the freehold, and a *quasi*-fee in the copyhold; in one event they are to convey to certain persons and their heirs. Then the gift is to the nieces for life, with remainder to their children without words of limitation, and, unless you find something in the will to control the gift, the children take a fee. There is nothing in the will to control the gift. The clause of accruer, which follows, shows the intention to be to give a fee. It is that if any of the nieces should die without issue, the share or shares of her or them so dying should go to the survivor or survivors of them, and his, her, or their heirs, and be assured to her or them or her and their heirs accordingly. The words "without issue" may mean (1) "without such issue"—*i. e.*, without having had a child; (2) "without leaving issue living at the death;" and (3) a general failure of issue. It was alleged that the words might here mean a general failure of issue. The law (before altered) supported this construction, the reason being that a gift to A. for life, and on his death without issue over to B., would only have given

A. a life estate unless you read it as an indefinite failure of issue, whereupon A. gets an estate tail by implication. That is, it was absurd to suppose that B., the remainderman, was to take on the failure of A.'s issue, and yet that the issue of A. could take nothing under the same limitation. Therefore the law implied an estate tail in A. The intention was defeated, because A. could bar the entail and get the fee. But there was a reason for it. That reason does not exist where there is an alternative gift. A gift to A. for life, with remainder to his children in fee, and a gift over if he dies without issue, is an alternative gift, and means if there is no person to take under the previous gift of the fee. And this is a gift of real and personal estate together. No one doubts that the personal estate vests absolutely in the children of the nieces. It is not at all likely that the testator intended them to take the personal estate absolutely, and the real estate for life only.

Upon the codicil a question arose as to whether cross remainders should be implied between children of the nieces; and the M. R. implied them, holding the true intention to be that the whole estate should go over together. If that is the intention, you are not to let a fraction of the estate descend meantime to the heir-at-law (*Doe v. Webb*, 1 Taunt. 234).

Dymond v. Croft.

[45 L. J. R., Ch. 612.]

A notice of motion for judgment in default of pleading is a document which may be served on a defendant who has not appeared, by filing it in accordance with Order XIX., Rule 6.

[And so also *Morton v. Miller* (App.), 45 L. J. R., Ch. 613; L. R., 3 Ch. Div. 516, where the Lords Justices adopted the view of the M. R. These decisions overrule V.-C. Hall's judgment in *Cook v. Dey*, L. R., 2 Ch. D. 218; 45 L. J. R., Ch. 611.]

Morrice v. Aylmer.

[45 L. J. R., H. L. 614; L. R., 7 E. and I., App. 717.]

Railway "stock" will pass under a bequest of "railway shares."

The M. R. considered himself bound by *Oakes v. Oakes*, 9 Hare, 666, and held otherwise, contrary to his own opinion. The House of Lords overruled *Oakes v. Oakes*. The decision *In re Gibson*, 35 L. J. R., Ch. 596; L. R., 2 Eq. 669, was not on this point. There was an ademption in that case. The Lord Chancellor (who decided *In re Gibson*) observed that, in both cases, he held that stock and shares were so much alike that, if the testator possessed either, they must pass under a bequest of either.

Purnell v. The Great Western Rail. Co. and Harris.

[45 L. J. R., Q. B. &c., 687; L. R., 1 Q. B. Div. 636 (App.).]

If a new trial is granted at the instance of one of several defendants, it must be granted against all parties to the action.

The Court of Appeal has jurisdiction to bring before it a party against whom no rule was moved in the Court below.

The four days' rule is not now absolute.

Abud v. Riches.

[45 L. J. R., Ch. 649; L. R., 2 Ch. Div. 528.]

The costs payable on clearing contempt are not now confined to any sum, but are in the discretion of the Court.

Eardley v. Granville.

[45 L. J. R., Ch. 669; L. R., 3 Ch. Div. 826.]

The estate of a copyholder in an ordinary copyhold is an estate in the soil throughout, except as to timber, trees, and

minerals. As to these, the property remains in the lord ; but, in the absence of custom, he cannot get either the one or the other, so that the minerals must in that case remain unworked and the trees uncut. The possession is in the copyholder ; the property is in the lord. If a stranger cuts down the trees, the copyholder can maintain trespass against the stranger, and the lord can maintain trover for the trees. If the lord cuts down trees, the copyholder can maintain trespass against the lord ; but if the copyholder cuts down the trees (irrespective of the question of forfeiture), the lord can bring his action against the copyholder. So in the case of minerals. If a stranger takes them, the copyholder can bring trespass for interference with his possession, and the lord can bring trover against the stranger to recover the actual minerals. If you once cut down a tree, the lord cannot compel the copyholder to plant another. The copyholder has a right to the soil where the tree stood including the stratum of air then left vacant by the removal of the tree. If the lord takes the minerals the copyholder is entitled to the space where they formerly were, and to use it at his will. If a shaft were made for working the mines the copyholder might descend in the shaft, and either walk in the space below, or use it for any other purpose.

If a freeholder grants lands, excepting mines, he severs his estate vertically, *i. e.* he grants it out in parallel vertical layers, and the grantee only gets the parallel layer granted to him, and does not get the intervening stratum or layer. That remains in the grantor. There may be parallel strata of many feet in one direction, and then an intervening stratum in another. The freeholder retains the stratum as part of his ownership, part of the vertical section of the land. The exception is not merely of the minerals, but of the subsoil containing them. As to the copyholder this is not so, because he, though he has no property in the stratum in the sense of being entitled to take the minerals, has property and possession in the sense that the moment the minerals are taken the space belongs to him, and to him only.

Clutton v. Lee.

[45 L. J. R., Ch. 684 ; L. R., 7 Ch. Div. 541.]

Applications under 30 & 31 Vict. c. 47, to vacate the registration of a *lis pendens*, after proceeding ended, should be made by motion in the matter of the Act and of the action or proceeding.

Ex parte Digby.

[45 L. J. R., Ch. 692.]

A clerk articulated to a solicitor for three years, who has been absent for sixteen months through illness, and afterwards has served thirteen months, cannot be examined, but must enter into fresh articles for six months and then be examined.

King v. Foxwell.

[45 L. J. R., Ch. 693 ; L. R., 3 Ch. Div. 518.]

When a man changes his domicile of origin, he must choose a new domicile ; and the word “choose” shows that it must be a free act on his part. He has so chosen when he has fixed his sole or chief residence in a country, not being the country of origin, with the intention of continuing to reside there for an unlimited period. The acquisition of a new domicile involves two facts ; residence in a new country, and intention to reside there permanently. Both these facts are “compound” facts. Residence involves more than can be seen by the eye. Mere eating, drinking, and sleeping in a house will not do. So as to permanency. That is not a fact ascertainable merely by limits of time. It is a matter of intention.

A man having acquired a domicile of choice may put an end to it of choice without necessarily acquiring another domicile of choice. An abandonment *de facto* is enough, and the result is the revival of his domicile of origin.

Mayd v. Field.

[45 L. J. R., Ch. 699; L. R., 3 Ch. Div. 584.]

A married woman with property settled upon such trusts as she should appoint by deed or will, and in default of appointment to her for life for her separate use, with remainder, if she survived her husband, to her executors, administrators, and assigns, without restraint on anticipation, covenanted, by deed executed during the coverture, to cause 1,000*l.* to be paid after her death to the trustees of her daughter's marriage settlement. The trusts of that settlement were to the daughter for life for her separate use, without power of anticipation, with remainder to the husband for life, with remainder to the children of the marriage. The covenant did not refer to the original power or to the property comprised in the settlement creating it. Afterwards, by her will made in exercise of the power, during the coverture, she bequeathed 1,000*l.* on trust for the daughter for life for her separate use, with remainder on certain trusts for her children, slightly different from those declared under the daughter's settlement. She also bequeathed the residue of her estate upon certain trusts. The married woman survived her husband, and after his death made savings out of her settled property, and sold some furniture, also part thereof, and invested the proceeds in stock.

Held, that though the covenant could not be supported as an execution of the power, yet it could be so as a general engagement binding her separate estate, and that she had under the original settlement a separate estate such as could be thereby bound.

In substance the wife had the property so as to make herself absolute owner—in substance she was the owner. There was no restraint on anticipation.

A provision for the children of a child, especially of a daughter, is considered as an amplification of the trust for the child herself. It is not a slight difference in the trusts which will induce the Court to adopt a view at variance with

the rule against double portions. Here the difference is slight, but there is a life interest given to the husband in the settlement and no such gift in the testamentary appointment. The testamentary gift is satisfied by the settlement to the extent to which the daughter and the daughter's children take under the settlement. The result is that there will be nothing coming to the daughter or her children under the appointment in the will unless the husband survive the daughter.

As to the dividends received after the husband's death, the separate use cannot attach to that, and it passes to the next-of-kin. As to the furniture which she sold and proceeds whereof she received, investing the same in railway stock, such stock is not separate property, but passes to her next-of-kin.

Blackmur v. Blackmur.

[45 L. J. R., Ch. 710; L. R., 3 Ch. Div. 633.]

The perpetual commissioners for taking acknowledgments of deeds by married women, under 3 & 4 Will. IV. c. 74, s. 82, need not be appointed for the county in which the acknowledgment is taken. Sect. 82 only means that certain commissioners shall be appointed for each county in order that you may find them when you want them. It has nothing to do with their acting for the county.

Webster v. Carline, 4 Man. & Gr. 27, questioned.

COMMENT.

By sect. 7 of 45 & 46 Vict. c. 39, one perpetual commissioner may now take acknowledgments.

Randell & Co. v. Thompson (App.)

[45 L. J. R., Q. B., &c., 713; L. R., 1 Q. B. Div., 748.]

The question is whether, under sect. 11 of the Common Law Procedure Act, 1854, the Court can stay an action

where there is no subsisting agreement, in the sense of an agreement such as can be enforced. Here there was a revocation of the agreement to refer. It is true that, after such revocation, the parties might have authorized the arbitrator to proceed, but that would have been to make a new agreement. It seems to me that, if the Court is satisfied that the agreement has been revoked, the Court must thereby be satisfied that "a sufficient reason exists why such matters cannot be" referred according to such agreement. The words of the section show to my mind that it alone contemplated an agreement still subsisting when the action is brought.

[*Blyth v. Lafone*, 1 E. & E. 435; 28 L. J., Q. B. 164, disapproved.]

In re Brooke's Estate, Brooke v. Rooke.

[45 L. J. R., Ch. 730; L. R., 3 Ch. Div. 630.]

It has long been a settled rule that, where a testator gives legacies generally, and afterwards gives the residue of his real and personal estate in one mass, the legacies are a charge on the residuary real as well as on the personal estate. The circumstance of the residuary estate and effects not being given to the executors (who were in the first part of the will directed to pay the legacies), but to other persons, does not take a case out of this rule.

D'Eyncourt v. Gregory.

[45 L. J. R., Ch. 741; L. R., 3 Ch. Div. 635.]

The Court has no jurisdiction to order heirlooms to be sold at the instance of the tenant for life, on the ground that the sale would be for the benefit of the parties interested.

COMMENT.

But in *Fane v. Fane*, L. R., 2 Ch. D. 711; 46 L. J., Ch. 174, V.-C. Malins, made an order as against remaindermen to sell heirlooms annexed to an estate mortgaged by the testator from whom the heirlooms came, to pay such mortgages.

Dicker v. Angerstein.

[45 L. J. R., Ch. 754; L. R., 3 Ch. Div. 600.]

This is a mortgage of all a man's real and personal estate, with a proviso giving power of sale on default upon a named day without any further consent by the mortgagor, &c.; the power of sale not to be exercised except in case of default. Then follows the proviso: "Provided also, and it is hereby agreed and declared, that upon any sale purporting to be made in pursuance of the aforesaid power in that behalf, the purchaser or purchasers shall not be bound to see and inquire" whether there was any case for a sale, "or as to the necessity or expediency of the stipulations subject to which such sale shall have been made, or otherwise as to the propriety or regularity of such sale. And, notwithstanding any impropriety or irregularity whatever in any such sale, the same shall, so far as regards the safety and protection of the purchaser or purchasers, be deemed to be within the aforesaid power in that behalf, and be valid and effectual accordingly;" followed by a provision that the remedy of the mortgagor for any impropriety should be in damages only. It appeared that nothing was due to the mortgagee when the sale took place. The purchaser is a *bonâ fide* purchaser, and so protected by the above language. The sale purports to have been made in pursuance of the power. That is enough.

COMMENT.

If a mortgagor wishes to prevent such a sale, he should give notice to the intending purchaser of its impropriety, stating the circumstances and giving means of verification of those alleged circumstances (*Jenkins v. Jones*, 2 Gif. 99).

In re Frith and Osborne.

[45 L. J. R., Ch. 780; L. R., 3 Ch. Div. 618.]

An ordinary power of sale and exchange authorizes a partition. If I read the power for the first time, and knew nothing of real property law, I should not know what the doubt could be.

There is a doubt. See Shep. "Touchst." p. 292, and Dart's "Vendors and Purchasers," p. 178. Lord St. Leonards' "Powers," 1861 ed. p. 856, also says, this "has

frequently been a question amongst conveyancers." Again, "it can scarcely be considered clear."

At page 858 he puts it that the question would be answered in the affirmative if *Doe v. Spencer*, 2 Ex. R. 752, was rightly decided. It is too late now to argue any question as to real estate on principle. Real estate is held on title, the law as to which is founded on the extraordinary caprices of former real property lawyers, supposed to be derived from the feudal tenure. Settled law must be followed.

In *Abel v. Heathcote*, 4 Bro. C. C. 278; 2 Ves. jun. 98, the words of the power are undistinguishable from those here. They were "to make sale of and convey, surrender and assure or convey in exchange." There, as here, the legal estate was in the trustees. Lord Loughborough's separation of the meaning of the words was, I think, correct. There might be something in an exchange which required both a surrender and a sale. The ground of Lord Eldon's doubt, as expressed in *M'Queen v. Farquhar*, 11 Ves. 475, was that exchange was different from partition, and that you could not exchange until after partition. After that expression of Lord Eldon's doubt, Sir Thos. Plumer, in *The Attorney-General v. Hamilton*, 1 Madd. 214, considered the matter too doubtful to force a title depending on a partition effected under the power on a purchaser. Then comes *Doe v. Spencer*, *ubi sup.*, in which the point arose directly; and it was decided that, as regarded tenants in common, at all events (and the parties before me are tenants in common), there was no substantial difference between an exchange and a partition. Mr. Preston's note to "Touchstone" showed that he saw no objection to such an exchange of an undivided moiety. In *Bradshaw v. Fane*, 3 Drew. 534; 25 L. J. R., Ch. 413, V.-C. Kindersley gave his opinion to the same effect, but considered the matter too doubtful to force the title on the purchaser.

Lord St. Leonards says the point wants a decision to make it quite clear. I am willing to give that decision. I hold that the passage in "Touchstone" (p. 292) is not good law. If a partition can be effected as between two, I think it can as between three. But I have not to decide that now.

Commissioners of Sewers of London v. Gellatly.

[45 L. J. R., Ch. 788 ; L. R., 3 Ch. Div. 610.]

When you have a multitude of persons interested in a right in the nature of a general right, and another multitude of persons interested in contesting that right, you may select some of the number to represent all, and finally decide the right as to all. Every one who is not actually present is bound, because he is present by representation, as much as he would be in a legatee's suit, or in a suit by a shareholder filing a bill to have the rights of shareholders declared, as in *Henry v. The Great Northern Rail. Co.*, 27 L. J. R., Ch. 1 ; 1 De G. & J. 606. If a single person, who is one of the multitude, can show fraud, or collusion, or anything of that sort, the case is different.

**Witham v. Taylor, Taylor v. Witham.**

[45 L. J. R., Ch. 798 ; L. R., 3 Ch. Div. 605.]

The question is under what circumstances entries made by a dead man in his books ought to be received in evidence. Entries against the interest of the man making them are receivable in evidence after his death, and, when receivable, receivable for all purposes. Of course, if any motive of another kind for making the entry is shown, the value of the evidence may be destroyed. The natural meaning of the entry standing alone must be against the interest of the maker, as Baron Parke pointed out in *Regina v. The Inhabitants of Lower Heyford*, 2 Sm. L. C., 6th ed., p. 300. An entry by a testator in his cash-book of receipt of money by him is against his interest, and it is evidence of a loan.

Doe v. Vowles, 1 Moo. & R. 261, disapproved.

**Fryer v. Morland.**

[45 L. J. R., Ch. 817 ; L. R., 3 Ch. Div. 675.]

"Entitled," in sect. 2 of the Succession Duty Act (16 & 17 Vict. c. 51), means "entitled in possession."

A disposition of property by way of *bond fide* sale for a sum payable on the purchaser's death, and secured by a charge on the property, does not confer a succession at the death of the purchaser.

On a sale out and out, succession duty is not payable. Looking at the Act as a whole, it is intended to grant duties on succession to property by persons succeeding to gratuitous life estates. The person to pay is he who gets something on the death of the prior owner, either by way of settlement, gift, or descent. The only exception which I find is that a marriage consideration is treated as if it were a gratuitous title, for this purpose. The contract made on marriage to provide for issue is treated as creating a succession. It is opposed to that notion that a purchaser, paying full value, is to pay duty besides. He gets nothing more by the falling in of the life. The vendor can in no sense be predecessor. Sect. 17, as to policies of insurance, was probably inserted *ex abundanti cautela*; but, inasmuch as a contract of that nature amounts to the purchase of a reversionary sum of money in consideration of a present payment of money, or of an annuity during the life of the assured, and, as such, is a contract which cannot fairly be described as a "disposition" of property, the section was not (if I am right) strictly required.

In construing an Act, when you find provisions precautionary, and by way of exceptions, but not strictly necessary as such, you do not necessarily infer that, because these are inserted, everything not included in the exceptions is to be included in the general provisions of the Act, which would not *per se* include the thing excepted.

Pigg v. Clarke.

[45 L. J. R., Ch. 849; L. R., 3 Ch. Div. 672.]

The ordinary meaning of the word "family" in a will, is the *children* of the person whose family is mentioned.

In one sense, "family" includes all a man's household—wife, children, and servants. The Latin *familia*, and the French *famille*, include the household. Another sense is *every one descended from a common stock*. The objection here to that interpretation is that it must include the man himself. The third sense is that commonly used—to signify *children*. If a term is used in more than one sense, and has a primary, secondary, and tertiary meaning, the rule of construction is this: the law has settled which of its several meanings is the primary one, and then you require a special context to give it any other meaning. The law has settled that the word means children, where a man has children.

COMMENTS.

See also *In re Hutchinson and Tenant*, L. R., 8 Ch. Div. 540 (M. R.), and *Humble v. Bowman*, 47 L. J. R., Ch. 62, where it was held by V.-C. Hall that the word might include a recognised illegitimate child (disapproving *Freeland v. Pearson*, 36 L. J. R., Ch. 374; L. R., 3 Eq. 658). And the same was held by L. J. James in *Lamb v. Eames*, 40 L. J. R., Ch. 447; L. R., 6 Eq. 597.

The above contains the rule as to bequests of personalty. In devises of real estate, the word "family" is generally equivalent to "heirs" or "heirs of the body." A devise to "A. and his family" would, in general, give A. an estate tail.

See Hawk. "Constr. Wills," p. 90.



Rhodes v. The Airedale Drainage Commissioners.

[45 L. J. R., Q. B. &c. 861; L. R., 1 C. P. Div. 402 (App.).]

An umpire appointed to ascertain amount of compensation under the Lands Clauses Consolidation Act, 1845, has power to state a special case under sect. 5 of the Common Law Procedure Act, 1854.

Rhodes v. The Airedale Drainage Commissioners, 43 L. J. R., C. P. 323, overruled; *In re The Dare Valley Rail. Co.*, L. R., 4 Ch. Div. 554, followed.

The Attorney-General v. The Mutual Tontine Westminster Chambers Association (Limited).

[45 L. J. R., Ex. 886; L. R., 1 Ex. Div. 469 (App.).]

The question affects the true construction of the Inhabited House Duty Act (48 Geo. 3, c. 55) and the Metropolis Valuations Act, (32 & 33 Vict. c. 67), ss. 45, 76. It is argued that certain apartments, or ranges of apartments, in blocks of buildings, are to be treated as separate "houses" within the Act of George 3, and rated as such. Each set is self-contained. But the block is an ordinary building. You would call each a house—which word is used in these acts in its ordinary sense. Authorities were cited to show that in some cases portions of a house may be described as a house; but none were produced to show that an entire house could not be still more properly so described. The Inns of Court and old religious houses are spoken of as "houses," though they include a great number of houses. The Charter House includes many houses. The first rule says that the duty shall be charged on the occupier; and the second is that every out-house, &c., occupied with a dwelling-house shall be rated therewith, the land valued therewith being restricted to one acre. Then sect. 6 shows that a house let in different stories, &c., is to be rated in the aggregate as one house. Then the poor rate value (48 Geo. 3, c. 55, Rule 7) is the total value of all the tenements, and cannot be less. It is not, therefore, "necessary" within sect. 76 of the Valuation Act, to make a separate valuation for house duty, because the poor rate value is ascertained.

Dawson v. Fitzgerald.

[45 L. J. R., Q. B., &c. 894; L. R., 1 Ex. Div. 257 (App.).]

Where the subject-matter of an action is such that it must be found by an arbitrator before it can be claimed, then it is a condition precedent to the right of action that the reference should have been held. This applies to two cases: (1) where

the action is brought to recover a sum to be named by a certain arbitrator; (2) where there is an express covenant or stipulation that no action shall be brought to recover the compensation until the amount has been ascertained by arbitration.

There may be two distinct covenants: (1) to pay a fair compensation generally; and (2) to refer the question of amount. There the non-compliance with the second is no answer to an action on the first. If an action is brought on the first without compliance with the second, the defendant may either bring a cross action on the second covenant for not referring or apply to the Court under sect. 11 of the Common Law Procedure Act, 1854, for an order to refer.

Stoner v. Todd.

[46 L. J. R., Ch. 32; L. R., 4 Ch. Div. 58.]

A provisional specification was never meant to be more than a protection of the inventor until the filing of the final specification. It is not intended to contain even such a description as would enable an ordinary workman to make the thing; but merely to disclose the rough sketch until the inventor can perfect the specification in detail. It is not, and cannot be, known to the public. It is never published except with, and as then becoming part of, the final specification. The insertion, therefore, in the provisional specification of a part which was omitted from the final specification, does not amount to prior publication of such omitted part, so as to avoid, for want of novelty, a subsequent patent taken out for such omitted part.

[See 46 & 47 Vict. c. 57.]

In re Coleman and Jarrom.

[46 L. J. R., Ch. 33; L. R., 4 Ch. Div. 165.]

J. C., who died June 3, 1875, devised all his freehold messuages "to the use of all and every the children of his late

brother, T. C., who should be living at his decease, or who should have died in his lifetime, leaving issue living at his death, in equal shares as tenants in common."

T. C. had six children; four were still living, and of full age; two died in the testator's lifetime; of these one only (T. H. C.) left issue living at the death of the testator.

The surviving children of T. C. contracted for sale of the property, and the purchaser objected that the share of T. H. C. either went to his issue living at the death of the testator, or to the testator's heir-at-law, and not to the rest of the class.

Judgment.—Doubtless the testator intended some provision for the family of any child of his brother who should die in his lifetime leaving issue living at testator's death. But he did not validly make such provision. The gift to T. H. C. (not being to a child) lapsed. It is impossible to preserve the gift to him in the shape of a gift to his issue.

As the deceased child cannot take, and his issue cannot take, do the surviving children take, or is there a lapse of the share of T. H. C.? The surviving children take. As a general rule, where property is devised to a class, it is to be taken by those members who are capable of taking it at the time of the death of the testator. It turns on the then capacity to take, not on survivorship. The devise is in the common form of one to the testator's own children. There is a primary intention that all shall take, and a secondary intention that those who can take shall take. Thus a testator (knowing the law of lapse) gives a legacy to a charity, his estate consisting partly of impure personalty. His primary intention is that the charity shall take; and his second, co-existing, secondary intention that the residuary legatee shall take what the charity cannot take.

The rule is, that the fund or the estate is to be divided among the members of the class who are capable of taking at the period of distribution; and those who are incapable of taking, whether by reason of death or as attesting witnesses to the will or otherwise, are excluded from the class.

Newman v. Piercey.

[46 L. J. R., Ch. 36; L. R., 4 Ch. Div. 41.]

The rule in *Garvey v. Hibbert*, 19 Ves. 125, that a gift to a class misdescribed in number is a gift to all the members of that class, does not apply where, from admissible evidence, it is possible to say which of the class were meant.

The general rule is that a gift to the children of any one means all the children; and it still means all the children, though you specify some number, unless there is some evidence to show who are the children meant. The error in the number is treated as a mere slip in expression.

Meyrick v. James.

[46 L. J. R., Ch. 38.]

An accounting party subpoenaed for examination cannot refuse to be sworn because he has not received sufficient notice of the points on which he is to be examined; but, after being sworn, he may for this reason object to answer.

[A person desiring to cross-examine (on accounts), either a plaintiff bringing in an account or any ordinary accounting person, must specify the particular items in which he wishes so to cross-examine (*Bates v. Eley*, 45 L. J. R., Ch. 270; L. R., 1 Ch. Div. 473).]

Middleton v. Pollock, Ex parte Wetherall.

[46 L. J. R., Ch. 39; L. R., 4 Ch. Div. 49.]

A client handed money to his solicitor to invest upon mortgage of a specified property, and received from the solicitor a written representation that the money had been so invested; and interest was paid during the solicitor's lifetime. After the solicitor's death it was found that this investment was not made, but that the money had been mixed with the solicitor's own money, and been invested with a larger sum, purporting to be the solicitor's own money, upon such pro-

perty. In a creditor's suit for the administration of the insolvent estate of the solicitor, held that the solicitor's estate was bound by his representation, and that the client's money was repayable out of the proceeds of sale of the mortgaged estate.

Ex parte **Adams.**

[46 L. J. R., Ch. 42; L. R., 4 Ch. Div. 39.]

An articulated clerk must serve under written articles for the whole five years; partial service under parol contract of service will not suffice.

Hilliard v. Fulford.

[46 L. J. R., Ch. 43; L. R., 4 Ch. Div. 389.]

If executors have properly accounted, and have made a correct partial distribution of the estate, and the remaining legatees then bring an action for administration, the costs will be borne by the shares remaining undistributed.

But if executors have made a wrong partial distribution, and their accounts are also incorrect, the costs of a subsequent administration suit of legatees will be ordered to be paid out of the whole estate, so as to charge the executors with the share of costs attributable to the distributed shares of the estate.

Ex parte **Stephens.**

[In the matter of the Trade-Marks Registration Act, 1875, 46 L. J. R., Ch. 46; L. R., 3 Ch. Div. 659.]

Read with *Orr Ewing & Co. v. The Registrar of Trade-Marks* (H. L.), 48 L. J. R., Ch. 707. If a label or mark contains some distinctive mark or marks and some not so, the former may be registered; and *In re Rotherham & Sons' Trade-Mark* (App.), 49 L. J. R., Ch. 511; L. R., 14 Ch. Div. 585; holding that the word "Tod" in Arabic could be registered;

and *Johnston v. Orr Ewing*, 51 L. J., Ch. (H. L.) 797. An imitation likely to deceive the ultimate purchaser will be restrained. See *The Singer Manufacturing Co. v. Logg*, 52 L. J. (H. L.), Ch. 481. The result of the decisions is that no one must use a word adopted by another to distinguish his goods in a manner calculated to make purchasers believe that they are getting the articles of the original manufacturer adopting the word or title.

[See 46 & 47 Vict. c. 57.]

Henderson v. Maxwell.

[46 L. J. R., Ch. 59; L. R., 5 Ch. Div. 892.]

A periodical is a book within the Copyright Act (5 & 6 Vict. c. 45). The entry at Stationers' Hall of the first number of a periodical under sect. 19 enables the proprietor to maintain an action to restrain the publication, in a separate form, of a serial tale which has appeared in subsequent numbers of the periodical; he need not register the tale in a separate form as a condition precedent to suing. There will be nothing in an objection that the claim is to restrain the publication of the tale—*e.g.*, the "*Verger's Ward*," *eo nomine*, instead of the periodical.

Hawes v. Paveley.

[46 L. J. R., C. P. &c. (App.) 18; L. R., 1 C. P. Div. 418.]

Prohibition will not be granted to restrain the Mayor's Court from proceeding where no plea to the jurisdiction is allowed under sect. 12 of the Mayor's Court Procedure Act (20 & 21 Vict. c. clvii.), ss. 12, 15.

Wright v. Davies.

[46 L. J. R., C. P. &c. (App.) 41; L. R., 1 C. P. Div. 638.]

An agreement between two incumbents to exchange their livings without payment or charge for dilapidations on either

side is not of itself illegal; it is not necessarily simoniacal, and does not contravene the provisions of the Ecclesiastical Dilapidations Act (34 & 35 Vict. c. 43).

The policy of the Act is to prescribe a satisfactory method of ascertaining the amount due from the outgoing incumbent, and the amount so ascertained is to be handed over to the governors of Queen Anne's Bounty. Formerly the incoming incumbent had to sue, and might pocket the money and not apply it in repairs. The effect of the Act is to make the new incumbent a trustee of the sum recovered.

Then it is said that the bargain was simoniacal because there was a disparity in values, and hence money's worth was to be given. But there is no allegation that this was the motive of the exchange. In order to establish the fact there must be both allegation and proof. Only a valuation could have informed the parties of the disparity.

Crossley *v.* The City of Glasgow Life Assurance Society.

[46 L. J. R., Ch. 65; L. R., 4 Ch. Div. 421.]

Messrs. S. were indebted to the plaintiff in a large sum. One of them promised to insure his life, and either assign it to the plaintiff or deposit it with him as security. On applying for the policy they gave notice to the agent of the insurance company that it was for plaintiff's benefit; and was ultimately intended to secure him. They asked the agent to have the policy made out and assigned to the plaintiff, but afterwards changed their minds and simply took the policy without any assignment being made. Then the assured member wrote to plaintiff: "I send you, as promised, policies on my life; kindly instruct your solicitor to prepare the necessary assignment to yourself." No consideration was stated, and there was no agreement to assign. No assignment was ever executed.

I do not think this an equitable assignment under the Policies of Assurance Act, 1867. It was to be either an assignment or a deposit, as plaintiff thought fit, and he allowed it to remain as a deposit. The company gave a receipt for the notice to them, under sect. 6 of the above Act. The acknowledgment, of course, made no difference. The solicitor who sent the notice stated that there had been no actual assignment.

The assured died, and no one would take out letters of administration of his effects. The plaintiff says he can solely, as depositor for value, give the company a good receipt. I think not; but under 15 & 16 Vict. c. 88, s. 44, I can, and will, do without the legal personal representative. The company must pay interest at 4 per cent.; but I shall allow their costs.

In re Parnham's Trusts.

[46 L. J. R., Ch. 80.]

Where the words in a proviso for forfeiture on bankruptcy are words of futurity, the forfeiture does not take place if the bankruptcy has been annulled before the first payment becomes due.

COMMENTS.

The M. R. said he "doubted the authority" of *White v. Chitty*, 35 L. J. R., Ch. 343; L. R., 1 Eq. 372; *Lloyd v. Lloyd*, L. R., 2 Eq. 722; and *Trappes v. Meredith*, 39 L. J. R., Ch. 366; L. R., 9 Eq. 229, but "simply followed" them; but, in *Samuel v. Samuel* (*post*), he explained that he had not intended to express a doubt as to the principle of *White v. Chitty*, &c., but only to say that he thought that principle ought not to be extended to an annulment after the death of the tenant for life; and that he doubted whether the fact of actual receipt of the income should have made any difference.

In *Ancona v. Waddell* (48 L. J. R., Ch. 115; L. R., 10 Ch. Div. 157), a gift over on forfeiture, "if the legatee should be declared bankrupt" (the legatee being life-holder of a residuary fund), was held not to take effect where the bankruptcy, of which testatrix had known, was annulled before anything had become payable. There is a leaning in favour of the legatee.

Lee v. Lee.

[46 L. J. R., Ch. 81; L. R., 4 Ch. Div. 175.]

Real property was settled on a lady and her husband for life, with remainder to their children, as they or the survivor should appoint, and, in default, to their children in fee. One of the children being a daughter, and about to be married, an agreement, dated March 23, 1869, was made, whereby the father and mother agreed not to deprive her of her proportionate share by exercising their power to her prejudice; and the intended husband then agreed for himself, his heirs, &c., that he would settle such share as his intended wife might take in the said property, either under appointment or, in default thereof, as therein mentioned, and on usual trusts. These articles were signed by the father and mother and the husband and wife. Before settlement executed the wife died, leaving two children. The husband's covenant was to settle what was not his; it was the wife's, and she concurred. It therefore binds the wife's representatives.

Martin v. Gale.

[46 L. J. R., Ch. 84; L. R., 4 Ch. Div. 428.]

By deed, executed during infancy, the defendant covenanted to repay a sum of 150*l.*, which he therein admitted that he required and obtained for expenditure upon necessities; and he thereby charged a reversionary interest in property with the sum.

Held, void. There was no legal obligation to execute such a deed, and it is not binding upon him after he attains twenty-one.

The Court of Chancery may—as, for special reasons, it did, in *In re Howarth* (42 L. J. R., Ch. 316; L. R., 8 Ch. Div. 415), acting as *parens patrie*,—charge the infant's property; but the infant cannot do it himself.

Layland v. Stewart.

[46 L. J. R., Ch. 103; L. R., 4 Ch. Div. 419.]

The assignment of copyright under 5 & 6 Vict. c. 45, must be in writing.

Chapman v. Chapman.

[46 L. J. R., Ch. 104; L. R., 4 Ch. Div. 800.]

T. C., a yeoman, made a will as follows:—

“I, T. C., wish to write my last will and testament. I direct that my estate, called B., be sold after my decease, and all my just debts be paid by my wife, L. C., the sole executrix of my will. To her I leave all my money, cattle, farming implements, &c., she paying my brother, J. C., the sum of . . .” The main question was whether furniture and live and dead stock passed under the above will.

The M. R.: I think that the testator did not intend to die intestate as to any portion of his property, and that he did intend to give all he had in the world to his widow. I decide that he effectually did this.

COMMENT.

Attempts were made to get the M. R. to adopt the *ejusdem generis* doctrine, reference being made to *Newman v. Newman* (26 Beav. 220) and *Barnaby v. Tassell*, L. R., 11 Eq. 363. The M. R. was, however, no friend of this doctrine. It will always be a difficult doctrine in application, because it is, if anything, easier to say what is not *ejusdem generis* with specified things than what is, and a limitation of the “&c.” would, at any rate, involve a speculation. In fact, the limitation would prevent any effect being given to the “&c.”

The River Wear Commissioners v. Adamson.

[46 L. J. R., Q. B., &c. 83; on appeal to House of Lords, 47 L. J. R., Q. B. 193; L. R., 2 App. Cas. 743.]

A liability imposed by statute is subject, as is one imposed by the common law, to a limitation, in case it is rendered impossible of performance by superhuman causes.

COMMENT.

See *Baily v. Crespigny*, ante, p. 55.

**Re The Phoenix Bessemer Steel Co., *Ex parte* The
Carnforth Hæmatite Co. (Lim.).**

[46 L. J. R., Ch. 115; L. R., 4 Ch. Div. 119.]

When there has been actual insolvency, and a declaration that the purchaser does not choose to pay, the vendor is not bound to deliver without the cash. The cases are summed up in *Ex parte Chalmers*, 42 L. J. R., Bank. 2, 37; L. R., 8 Ch. Div. 289. There must be that sort of insolvency declared which should satisfy every reasonable man that the purchaser does not intend to pay; that there is neither intention nor probability. The company here merely said, in effect, "We are temporarily embarrassed, and may have difficulty in paying, but go on with your contract, and we will find the money." The vendors are not, therefore, entitled to refuse to deliver without cash payments.

The Lords Justices were satisfied that the decision of the M. R. was right, and so were the majority of the Lords.



Warner v. Murdoch, Murdoch v. Warner.

[46 L. J. R., Ch. (App.) 121; L. R., 4 Ch. Div. 150.]

Motions for new trials of actions in the Chancery Division must be made to the judge to whose Court the cause is attached.

Actions in the Chancery Division will be tried in the county mentioned in the claim, and, if no place is named, will be placed in the list for Middlesex, in the same way as actions in Common Law Divisions.



Trethewy v. Helyar.

[46 L. J. R., Ch. 125; L. R., 4 Ch. Div. 53.]

Testatrix bequeathed "to the executors or executrix of A. 100l." A., who died in testatrix's lifetime, left an executor and two executrices, who all died in testatrix's lifetime.

Held, that the legacy was to the legal personal representatives of A., in trust for the persons entitled to her estate.

The reason for the authorities that it is not a gift to the representatives beneficially, is that no testator knows who, at his death, may be the legal personal representatives of a dead man.

There is no "residue" of personality until you have paid debts, funeral, and testamentary expenses, and costs of administration. As between a share of residue well bequeathed, and a share of residue which has lapsed, the costs must, therefore, be paid out of the personal estate before the residue is divided, and not primarily out of the lapsed share.

I dissent from V.-C. Malins in *Gowan v. Broughton*, L. R., 19 Eq. 77; 44 L. J. R., Ch. 275. As to his decision in *Scott v. Cumberland*, L. R., 18 Eq. 578; 44 L. J. R., Ch. 226, I say nothing—it affected real estate.

Cunliffe v. Brancker.

[46 L. J. R., Ch. (App.) 128; L. R., 3 Ch. Div. 393.]

The rule of law was, and strange to say still is, that a contingent remainder amounting to a freehold fails, unless there be a preceding freehold estate continuing to exist up to the happening of the contingency. Such remainders have been protected against the destruction of the preceding particular estate (8 & 9 Vict. c. 106, s. 8), but have been still left to die through an inherent defect in the original constitution. Here the contingent remainder is unprotected. The frame of the will shows an intended operation under the Statute of Uses; but, by a blunder, no sufficient estate of freehold to support the contingent remainder was inserted. The Lords Justices: "We must affirm the judgment of the M. R."

COMMENT.

See now 40 & 41 Vict. c. 33, providing that contingent remainders created after that Act are to take effect as springing or shifting uses, or executory devises. The statute was passed in consequence of the state of the law as pointed out in above case.

In re Cooper v. Harlech.

[46 L. J. R., Ch. 133; L. R., 4 Ch. Div. 803.]

A trustee for sale may properly sell the trust property, with other property held by another owner or trustee for sale, for an entire price, where a sale in that manner will be more beneficial to the *cestui que trust*, provided the purchase-money be properly apportioned, and the conditions affecting the other property are not such as to injure the sale of the trust property.

But the purchaser ought before completion to be satisfied that there has been a due apportionment. Ordinarily the trustees who are selling will be the judges as to this proper apportionment.

As a general rule the purchaser ought to see also that there is evidence that the sale in one lot is beneficial to the *cestui que trust*. If the trust property consists of undivided shares no such evidence is necessary, because the fact is self-evident.

As to *Rede v. Oakes*, 34 L. J. R., Ch. 145; 4 De G. J. & S. 305; 32 Beav. 555, the ground of that decision was the probability of injury to the value on the ground of the depreciatory conditions there adopted.

Before *Alexander v. Mills*, 40 L. J. R., Ch. 73; L. R., 6 Ch. Div. 124, nothing was easier than to say a title was doubtful. I personally doubt whether conditions, as a rule, deteriorate from selling value; but, at any rate, think that evidence should have been given of depreciation from that cause. The purchaser's objection in that case was allowed, not because the sale was not proper, but because of the impropriety of the conditions.

Cavendish v. Cavendish, L. R., 19 Ch. 319, is a judgment without reasons. It was not a case of trustees of two properties, subject to different trusts, selling them together. It was, in effect, a sale by the beneficial owners of two properties with consent of mortgagees. It has nothing to do with the doctrine in question. *Morris v. Debenham*, L. R., 2 Ch. Div. 540 (Malins, V.C.), is clearly right.

As to the question with respect to succession duty, the case is within sect. 2. When the Act was passed Lord M. was equitable tenant for life, with remainder to his eldest son in fee. There were mortgages on their respective estates—in equity only amounting to money charges. There was a perfect succession under sect. 2 in respect whereof duty was paid. By subsequent default the power of sale became exercisable, the mortgages being before the Act. If Lord M. and his son had sold—and they did sell through their mortgagees—that would have been an alienation, under sect. 15, not creating a new succession. That sect. means that if the title there referred to does not confer a new succession the Crown is to wait, and if it does confer a new succession the Crown is to get payment on whichever devolution comes first [but not on both].

COMMENT.

See *Tolson v. Sheard* L. R., 5 Ch. D. 19; 46 L. J., Ch. App. 815, which is a decision that trustees holding distinct properties on distinct trusts must not, ordinarily, lease them together.

—◆—
The President, &c., of Magdalen Hospital v. Knotts.

[46 L. J. R., Ch. 149; as decided on appeal 48 L. J. R., (H. L.) 579; L. R., 4 App. Cas. 324.]

The 13 Eliz. c. 10, s. 3, avoids leases of charitable property for more than twenty-one years or three livēs, and provides that, even for that period, the best obtainable rent must be reserved. If a lease in excess of this period, and at a peppercorn rent, is granted, and the lessee enters and pays no rent for twenty years, the Statute of Limitations bars any action, for no tenancy is created, and the statute runs from the lessee's entry. The lease is not voidable only, but absolutely void *ab initio*.

—◆—
Evans v. Buck, Buck v. Evans.

[46 L. J. R., Ch. 157; L. R., 4 Ch. Div. 432.]

Relief in the alternative cannot be given upon inconsistent allegations in the same pleading.

COMMENT.

But a plaintiff seeking alternative, inconsistent relief against different defendants has a right to have the first alternative tried out (*Child v. Stenning*, 47 L. J. R., Ch. 371; L. R., 5 Ch. Div. 695).

Portal v. Emmens.

[46 L. J. R., C. P. (App.) 179; L. R., 1 C. P. Div. 664.]

The meaning of the term "shareholder," in sect. 36 of the Companies Clauses Consolidation Act (8 Vict. c. 16), is governed by sect. 3, and thereby made to apply to a "member." Sects. 85 and 86 of the Act mean that no one can be qualified to be elected a director unless he holds thirty shares; and if, after election, he ceases to hold thirty shares, he ceases to be a director.

Hinks v. The Safety Lighting Company.

[46 L. J. R., Ch. 185; L. R., 4 Ch. Div. 607.]

The "claim" at the end of a final specification must tell the public exactly what the invention is. When it only describes an invention not novel, a patentee cannot refer to descriptions and to drawings accompanying the specification for the purpose of showing that some other than the natural construction of the "claim" is the true construction.

COMMENT.

And see now 46 & 47 Vict. c. 57. Part II.

The Attorney-General v. The Great Western Railway Company.

[46 L. J. R., Ch. 192; L. R., 4 Ch. Div. 735 (App.).]

The report of the inspector of the Board of Trade, under 5 & 6 Vict. c. 55, s. 6—that the works of a railway proposed to be opened are incomplete, giving reasons—is final, and will be enforced, even though the Court may consider the reasons insufficient. "The order of the M. R. is right."

Holme v. Guy.

[46 L. J. R., Ch. 223; affirmed on appeal, 46 L. J. R., Ch. 648; L. R., 5 Ch. Div. 901.]

Section 17 of the Charitable Trusts Act (16 & 17 Vict. c. 135)—requiring the sanction of Charity Commissioners before certain proceedings—was never intended to apply to common law actions under the old procedure, and, therefore, does not apply to actions of a like nature, although brought under the new procedure and in the Chancery Division of the High Court. The action in question was one brought by the governors of a charity to restrain a dismissed schoolmaster from teaching at the school and remaining in possession of the schoolhouse.

This was in effect an action of ejectment, or for recovery of land. It would formerly have been demurrable from want of equity, because there is no sufficient allegation of threatened injury to warrant an application for an injunction.

COMMENT.

It is explained that the Act was passed to stop the costly *equity* proceedings to which charitable properties were formerly subjected.

***In re* The Ebbw Vale, &c., Company (Lim.).**

[46 L. J. R., Ch. 241; L. R., 4 Ch. Div. 46.]

[The jurisdiction to reduce paid-up capital of a company, held in this case not to exist, was supplied, in consequence of the M. R.'s suggestions, by 40 & 41 Vict. c. 26, s. 3.]

Hampton v. Holman.

[46 L. J. R., Ch. 248; L. R., 5 Ch. Div. 183.]

It is not the province of the Courts to make declarations of future rights where no present relief can be given. In *Forsbrook v. Forsbrook*, 8 De G. M. & G. 391; 26 L. J., Ch. 27, an unintentional disregard of this rule took place.

A testator devised his freeholds and copyholds to trustees upon trust to pay the income to his unmarried daughter

during her life, and, after her decease, if she should marry and have children, to her children during their lives, and in like manner to their children, each family taking among them their father's or mother's share.

On petition by the daughter, who was unmarried,

Held, that the limitation to her unborn children was not void for remoteness.

The question would not be arguable but for the *dictum* in *Hayes v. Hayes*, 4 Russ. 311, where Sir John Leach said: "You cannot limit to an unborn person for life unless the remainder vests in interest at the same time." That must have been a slip. It never was the law that the remainder must so vest. A life estate might always be given to an unborn person with or without a remainder over. The dispositions following such life estate can be separated from it.

The *cyprès* doctrine is not to be confined to cases of wills of an executory character. It is a rule of construction, under which you sacrifice the expressed intention to the paramount or general intention, where that expressed cannot be effectuated. Are there sufficient words in this will to show that the words "child" and "children" mean "issue" or "heirs of the body?" I think not; but that "child" and "children" are used in the natural sense, and not as meaning issue of every degree. The children of the petitioner, if she has any, will take estates for life. I think the effect of the ultimate remainder (applying the *cyprès* doctrine) is to give the daughter an estate tail in remainder.

Cuddon v. Cuddon.

[46 L. J. R., Ch. 257; L. R., 4 Ch. Div. 257.]

A tenant for life who discharges succession duty which is in part chargeable on the interest in remainder, is entitled to be recouped to the proper extent out of such interests and has a charge for the amount, although such tenant for life may be a father so paying for wife and children. He is in the position of an ordinary tenant for life discharging an incumbrance on the capital.

Clowes v. Hilliard.

[46 L. J. R., Ch. 271; L. R., 4 Ch. Div. 413.]

Those who are parties to an administration action must have either a vested or a contingent interest. Those who may or may not be members of a class to be ascertained in the future are not proper parties.

I do not agree with Lord Cottenham's reasoning in *Roberts v. Roberts*, 17 L. J. R., Ch. 174; 2 Ph. 534; 2 De G. & S. 29, for the gift there was to a class of which the widow might not be one; nor with Lord Westbury's in *Davis v. Angel*, 4 De G. F. & J. 524, for the son there had a present interest, and the happening of the future event on which it was to vest alone was uncertain. The decisions are right, however, in each case, that nothing less than an interest will do; the mere chance of being a member of a future class will not do.

Application was made to join another plaintiff; but the M. R. held that this could only be done, under Order XVI., Rule 2, where there had been a *bonâ fide* mistake in the institution of the action.

[The "mistake" must be one as well of law as of fact (*Duckett v. Gorer*, L. R., 6 Ch. D. 82, 46 L. J. R., Ch. 407).]

Ex parte Joyce.

[46 L. J. R., Ch. 295; L. R., 4 Ch. Div. 596.]

Service by an articulated clerk who stipulates for 150*l.* a year salary during service is valid.

In re Kerr's Trusts.

[46 L. J. R., Ch. 287; L. R., 4 Ch. Div. 600.]

A testatrix, in exercise of an exclusive power of appointment amongst her children, in default whereof the gift was to all her children equally, gave personal property to two persons as joint tenants, one being an object of the power, and one not. Both survived the testatrix.

Held, that the object of the power took a moiety of the fund, and that the other moiety went as in default of appointment.

Argument.—In *Humphrey v. Tayleur*, Amb. 136, it was held that if an estate is limited to two jointly, the one capable of taking, the other not, he who is capable shall take the whole. It has not been decided that the same rule applies to an appointed estate; but it has been held that where a fund is appointed to persons who cannot take, together with another who can, and it is uncertain how much each will take, the latter will take the whole (*Alexander v. Alexander*, 2 Ves. sen. 640). It is as if testatrix had struck out the name of the donee incapable of taking without revocation of the appointment (*Short v. Smith*, 4 East, 419).

See also *In re Brown's Trusts*, L. R., 1 Eq. 74.

The M. R.: I am not bound to apply to personalty the old feudal rules as to real estate. I shall be guided by the expressed intention of the testator. That was that each appointee should take half the fund, with the superadded intention that, if one died before the period of severance, the other should take the whole. [The fact that one object of the power (an illegitimate daughter) never could take prevented the passing of the whole to the object who was capable of taking, because no legal joint tenancy ever arose.]

Original Hartlepool Collieries Co. v. Gibb.

[46 L. J. R., Ch. 311; L. R., 5 Ch. Div. 713.]

Going, stopping, and returning, in a reasonable manner, is the proper use of a highway or a navigable river. Each man has a reasonable right of access to his wharf. The defendant, has, however, stopped the plaintiff's steamer from in any case getting to her berth. That is wrong. But when not impeding the right of plaintiff or any one else to access, the defendant's steamer might even lie athwart the plaintiff's wharf.

Pender v. Lushington.

[46 L. J. R., Ch. 317; L. R., 6 Ch. Div. 70.]

Votes of shareholders in a limited or other company are rights incident to property, and, as such, may be exercised irrespectively of motive; nor can the Court inquire into motives. A crucial test of the law as to this is that, if a landlord had two tenants—one of whom voted as he wished, and the other did not—I could not restrain the landlord from distraining on the latter, although he did not distrain the former.

The right of the individual shareholder to vote could, I think, be enforced, by action against any one preventing the vote from being taken.

The Imperial Bank v. The London and St. Katharine's Dock Co.

[46 L. J. R., Ch. 335; L. R., 5 Ch. Div. 195.]

The M. R. considered it proved that, by the usage of the London Dry Goods Market, a broker who buys for an undisclosed principal is personally liable to the seller for the price.

Re The Caerphilly Colliery Co., Pearson's Case.

[46 L. J. R., Ch. (App.) 339; L. R., 5 Ch. Div. 336.]

Section 165 of the Companies Act gives the Court power to order a present or past director to answer for any misfeasance or breach of trust. A director who has received, as a present, part of the purchase-money of property sold to the company, and is knowingly in the position of agent or trustee for the purchasers (*quà* director), cannot retain that present as against the *cestui que trust* company.

Leigh v. Brooks.

[46 L. J. R., Ch. (App.) 344; L. R., 5 Ch. Div. 592.]

An action involving charges of fraud will not, as a rule, be referred under sect. 57 without the consent of both parties. But, in *Hock v. Boor*, 49 L. J. R., C. P. (App.) 665, Lords Justices Brett, Cotton, and Thesiger, adopting the effect of the above case, pointed out that the rule was not an absolute one, as sect. 57 did not positively prohibit compulsory references of charges of fraud.

As to compulsory references, where charges of personal fraud are alleged, in cases where there is between the parties (*e. g.* partners) a covenant or agreement to refer, see *Russell v. Russell*, *post*.

Re The Langham Skating Rink Co. (Lim.)

[46 L. J. R., Ch. (App.) 345; L. R., 5 Ch. Div. 669.]

Looking at the five cases in which alone the Court is to make an order for compulsory winding-up, this is not one. The fifth case is where the Court thinks it just and equitable so to order. As these companies are governed by their own domestic tribunal, the body of their own members, the decision should, if possible, be left to that body. The order must be one of simple dismissal, the petition being demurrable. We have no power to order a meeting of the company to consider its own position.

COMMENT.

But in a proper case the Court will adjourn in order to enable resolutions to be passed expressive of the views of the majority. See *Blackpool v. Hampson*, L. R., 23 Ch. D. 1.

Adams v. Angell.

[46 L. J. R., Ch. (App.) 352; L. R., 5 Ch. Div. 635.]

Toulmin v. Steere, 3 Mer. 210, only amounts to this. Where a man purchases from the mortgagor the equity of redemption in an estate subject to several mortgages, and pays off the first of such mortgages, having notice of the other incum-

brances, he is not entitled to say that the first mortgage is not extinguished, unless there is some expression of an intention to keep it alive; and the second mortgage is let in. But the rule is not to be extended. The mere form in which a charge is paid off has never in equity been held to decide the question whether it was intended to keep it alive. The person paying it off may keep it alive either (1) by assignment to a trustee, or (2) by declaration of intention. If nothing is done to show an intention, then, where there is notice of the other incumbrances, *Toulmin v. Steere* applies. Here the first mortgagee obtained an ordinary foreclosure decree against the second mortgagee and the mortgagor. Then the mortgagor became bankrupt, and the foreclosing mortgagee, pending the action, and after decree, purchased the equity of redemption from his trustee. The deed conveyed the property subject to the claim of the second mortgagee. That claim was to redeem the first mortgagee, and that is all. He must pay him principal, interest, and costs. It was said that the value of the property was less than the first mortgage; but that was unimportant.

COMMENT.

Not only is "the doctrine of *Toulmin v. Steere* not to be extended" (as L. J. James says), but the Lords Justices evidently disagreed with it, and the House of Lords would probably not now uphold it. At any rate, a very slight indication of intention will serve to keep the first charge alive. V.-C. Hall's affirmed judgment sets out the authorities fully.

In re Bellis's Trusts.

[46 L. J. R., Ch. 353; L. R., 5 Ch. Div. 504.]

Where the effect of a will is, under *Greville v. Broune*, 7 II. L. C. 689, and similar cases, to charge debts and legacies on general residuary realty and personalty, trust estates will not pass under the general devise. *In re Brown & Sibley's Contract*, L. R., 3 Ch. Div. 156, not followed.

[See new provisions of the Conveyancing and Law of Property Act, 1882.]

Earl of Egmont v. Smith, Smith v. Earl of Egmont.

[46 L. J. R., Ch. 356; L. R., 6 Ch. Div. 469.]

The auctioneer to whom a deposit has been paid ought not, as a general rule, to be made a defendant in an action for specific performance, unless before action he refuses to pay the deposit into Court; but where the deposit was large (6,850*l.*), held, that the largeness of amount justified his being so joined.

A vendor of land may be required by the purchaser to convey land, sold as a whole, in parcels, by separate conveyances to be executed at the same time, on tender of the entire purchase-money and additional costs thereby incurred; but not, in the absence of stipulation, to so convey at intervals of time.

Completion was to have been September 29, 1875. The estate was let to yearly tenants. Completion was delayed. In September the vendors, so requested by purchaser, gave several tenants notice to quit at Lady Day, 1876. Afterwards, it appearing probable that the purchase would not be even then completed, they, after notice to purchaser, relet to the old tenants from year to year on proper terms, excluding the Agricultural Holdings Act of 1875. The purchaser had sub-sold to persons who required vacant possession at Lady Day, 1876, but the purchaser was not ready to complete at Lady Day. Held, that the vendors were justified in so re-letting, and were bound to do so under any circumstances short of indemnity from the purchaser against consequences of allowing the land to go out of cultivation.

COMMENTS.

In country sales, the vendor's solicitor usually receives the deposit. To meet *Edgell v. Day*, H. L. R. 8; L. R., 1 C. P. 80; 35 L. J., C. P. 80, insert in the conditions that the deposit is to be held by the recipients "as stakeholders between the vendor and purchaser."

It may be convenient here to refer to the "rule of the three A's." as explained by the M. R. in *Mathias v. Yetts*, 46 L. T. (N. S.) 497, and again mentioned by him in the *Att.-Gen. v.*

Vestry of Bermondsey, post. If an agent, an attorney, or an arbitrator, is party to a fraud from which he gets no personal benefit, he may be made a party to the action to be fixed with the costs if but only if the principal defendant is unable to pay them. This rule the M. R. never much approved, and it will not be extended.

In re Sibley's Trusts.

[46 L. J. R., Ch. 387; L. R., 5 Ch. Div. 494.]

A testator devised realty to trustees upon trust for A. during her life, and after her decease to sell the same, and hold the proceeds in trust for all and every the children of his uncle (who was dead when the will was made) or their issue, in equal shares *per capita*. There were only two surviving children of the uncle at the date of the will. Held, that the issue of the children of the uncle who were dead at the date of the will were entitled to participate, taking in equal shares as between themselves the parents' shares. The testator meant by his description of the first class "all the children my late uncle had."

When a person claims by substitution he must show that the person for whom he claims to stand could himself have taken. A bequest to J. J., "or his issue," means that the children are only to take if J. J. is dead (*Salisbury v. Petty*, 3 Hare, 86). If the gift is "to the children of my nephew," or "to my nephews and nieces," or "to my great-nephews and nieces," "or their children," the children who take under the "or" (unless the word is conjunctively used) are the children of the class to whom the previous gift is made. But upon the question what that class is—whether, *e. g.* the class includes people dead at the date of the will or dying in the testator's lifetime, or any one who would not take at the testator's death—the authorities throw no light. It depends on the terms of the will. This will show an intention to include the issue of deceased children, who take their parents' share.

COMMENT.

Read with this case also *In re Smith's Trusts*, L. R., 5 Ch. D. 497, n.; and *In re Webster, -Widgen v. Mello*, L. R., 23 Ch. D. 737; 52 L. J., Ch. 767, where the rule in *Christopherson v. Naylor*, 1 Mer. 320, recognized in *West v. Orr*, L. R., 8 Ch. D. 60; 47 L. J., Ch. 294, was held to apply to a gift of personalty "to all the children of A., or in event of decease, to their descendants," and a child of a child of A., who was dead at the date of the will, was excluded.

In re The Pen-y-Van Colliery Co.

[46 L. J. R., Ch. 390; L. R., 6 Ch. Div. 477.]

An order to continue the voluntary winding-up of a company under the supervision of the Court, under sect. 147, cannot be made by any one except the company, a creditor, or a contributory.

A person claiming unliquidated damages for alleged fraudulent misrepresentation is not such a creditor.

In re The Lowestoft, Yarmouth, and Southwold Tramways Co.

[46 L. J. R., Ch. 393; L. R., 6 Ch. Div. 484.]

A company empowered, by provisional Board of Trade order, to construct a tramway, failed to make it within time limited, and was ordered to be wound up by the Court. The Board of Trade rules provide that, in such case, the deposit shall either be forfeited, or, in the discretion of the Court, paid to the liquidator, or be otherwise applied as part of the assets of the company for the benefit of creditors.

The only creditors to be considered in such case are meritorious creditors, and not shareholders, and the promoters are not, by any device, to get any benefit from the deposit. The application is to pay the deposit to the petitioners, partly to pay costs of petition, and partly to pay promoters what they advanced. I dismiss it.

In re Taylor.

[46 L. J. R., Ch. 399 ; L. R., 4 Ch. Div. 157.]

In questions as to the custody of infant children, there are for consideration (1) the paternal right, (2) the marital duty as a condition of recognising the paternal right, (3) the interest of the children. The two latter reasons induced the legislature to interfere, as by the recent statute, 36 & 37 Vict. c. 12, &c. See *Re Halliday's Estate*, 17 Jur. 56.

Kerr v. The Corporation of Preston.

[46 L. J. R., Ch. 409 ; L. R., 6 Ch. Div. 463.]

An urban authority threatened proceedings for the bringing forward of a house, part of a street, beyond the frontage line. The owner alleged that the board had acquiesced in such bringing forward, and sought an injunction against the proceedings.

Held, that the Court had no jurisdiction to restrain same. The doctrine of acquiescence cannot be applied to public functionaries. The only power of the board is to license the intended act in writing. Acquiescence implies the right to allow that which a person sees done.

Lord Auckland v. The Westminster Local Board, 41 L. J. R., Ch. 723 ; L. R., 7 Ch. 597, can only be binding as it stands, viz. as a case where the Westminster board had threatened to pull down what they had no right to pull down—a wrongful act which the Court might restrain. I read the facts there differently, as I think the board only threatened to apply to a magistrate for leave to pull down, and I should have said that the injunction ought not to have gone, because the magistrate could decide the question.

This is a purely criminal proceeding ; the information can be laid by any one, and half the penalty goes to the informer.

In re **Reeve's Trusts.**

[46 L. J. R., Ch. 412; L. R., 4 Ch. Div. 841.]

A legacy to one of the executors of a will at the death of the tenant for life of the residuary estate, is payable whether the executor has ever proved or acted or not. The fact that payment is so deferred rebuts the presumption that it was given to him in his representative character.

Costs of ascertaining classes amongst whom residuary estate is divisible are costs of administration, and, as such, payable out of the residuary estate, and not out of the shares of the classes in question.

The rule is that the costs of ascertaining the construction of a gift of a share of a residue are costs of administration; although the question of construction may relate to that one share only. See *Boulton v. Beard*, 3 De G. M. & G. 608.

The Merchant Banking Co. of London v. The Phoenix Bessemer Steel Co.

[46 L. J. R., Ch. 418; L. R., 5 Ch. Div. 205.]

A custom in the iron trade that warrants expressed to be for "steel rails—iron deliverable (f. o. b.) to Messrs. S. & Co. of London, or to their assigns, by indorsement hereon," are negotiable securities, giving holders thereof priority over a lien of unpaid vendors, held to be established.

Ex parte **Sheil, re Lonergan.**

[46 L. J. R., Bank. (App.) 62; L. R., 4 Ch. Div. 789.]

A person who lends money to a trader at a rate of interest varying with profits, and who also takes a mortgage of his debtor's house of business and goodwill, is not deprived of any of his ordinary mortgagee rights because of the provisions of the 28 & 29 Vict. c. 86, ss. 1, 5. Sect. 5 only provides

that in case of bankruptcy the lender mentioned in sect. 1 shall not, in competition with other creditors, recover any portion of his principal, or the profits or interest payable in respect of the loan. The mortgage is not affected or confiscated by this provision. The mortgagee does not seek to recover anything in the shape of money out of the assets. He says: "I have, or can obtain, legal possession of the house, subject to the trustee's right to redeem me." The right of a mortgagee to keep the estate does not depend on his right to recover the debt in the action—such rights are wholly independent of one another. Thus a mortgagee of a reversionary estate who had not received anything for twenty years, the tenant for life living beyond that time, might still keep the estate as security, and a mortgagee might take a debtor's body, and thus extinguish the debt at law; but the mortgagor could not get back the estate without paying the money.

Ex parte McArthur, 40 L. J. R., Bank. 86, not followed.

The New Sombrero Phosphate Company v. Erlanger.

[46 L. J. R., Ch. 425 (App.): affirmed in House of Lords, 48 L. J. R. (H. L.) 73; L. R., 3 App. Cas. 1,218.]

The action is by a limited company against its promoters, who were also vendors to the company of a mine in the West Indies, to set aside the contract, upon the ground that it was not fairly entered into, and therefore is not binding on the company. The answer is a denial of unfairness, allegation of *laches* or acquiescence, and that it is not a transaction which can be set aside by the company, but that only damages could be recovered by those individuals who were induced by the misrepresentation to take shares.

The prospectus omits material things. It was issued by the promoters, and actually prepared by them. It was brought ready printed to the meeting, and nominally adopted by the directors. The prospectus does not state who the

vendors were—and they were, in fact, the promoters—nor does it state the price which they gave. Promoters of a company stand in a fiduciary relation to that company, which is their creature. In this case, emphatically so; for, up to the issue of this prospectus, there was no *bonâ fide* shareholder except the promoters. It untruly states that the directors had entered into a provisional contract for purchase, because the promoters only had so contracted.

There was no contract binding on the company at all, this concealment having existed; but the company is the body with whom, by its agents, the contract purports to have been made, and, therefore, they rightly apply to set it aside. You may have as defendants twelve parties to a fraud, and one judgment against all. Irrespectively of whether, *inter se*, there can be contribution, the plaintiff may enforce judgment against any one. This is to deter men from frauds. The case as to alleged *laches* fails.

Newcomen v. Coulson.

[46 L. J. R., Ch. 459 (App.); L. R., 5 Ch. Div. 133.]

A grant of a right of way to the owners for the time being of land may be exercised by persons for the time being owning severed portions of such land. Where the grant is in respect of the lands, and not of the person, it is severed when the lands are severed—*i.e.* it goes with every part of the severed land. Although the land may have been, at the time of grant, an agricultural field, yet a grant in general terms is not to be restricted to agricultural purposes; it is a general right of way to any houses which may be built or which are being built on it, &c. The grantee of a right of way has a right to enter on the land of the grantor over which the way extends to make the grant effective—*i.e.* to enable him to exercise the right granted. That includes not only repair, but the right of making the road or way.

Pooley v. Driver.

[46 L. J. R., Ch. 466; L. R., 5 Ch. Div. 458.]

If a partnership is established as a fact, the liability to creditors is a mere incident of such fact. Partnership is a contract, involving mutual consent, for carrying on a business bringing profit, and in some shape dividing that profit. It is, at least, that. Whether it is more, has been a question. Where you find an indefinite sharing in profits, there is a *prima facie* partnership. If, under the guise of an arrangement as creditor and debtor, parties are really, in substance and not in form only, trading as principals, and putting forward as ostensible traders others who are really their agents, they cannot escape liability as partners (*Mollico v. Court of Wards*, L. R., 4 P. C. 419). *Cox v. Hickman*, 30 L. J. R., C. P. 125; 8 H. L. Cas. 268, where it refers to "agency" means the agency of one person acting on behalf of the firm. If you cannot grasp the notion of a separate entity for the firm, then consider that the "agent" acts partly for himself and partly for others, and, to the extent that he acts for the others, he is an agent. Every partnership involves the doctrine of agency.

Bovill's Act (28 & 29 Vict. c. 86) appears to have been founded on a mistaken impression as to what the law was. Sect. 1 of the Act was not needed, because it was established before Lord Eldon's time. It was, on the other hand, equally well settled that the receipt of a share of the profits does *prima facie* constitute partnership. The two are lumped together by the Act, and, therefore, its declaration of what the law was before it, is not of importance one way or the other. The Act means that, to escape, the advance must be a real loan. Is the position, in substance, that of creditor and debtor or partner? That is the question for consideration.

In re Foster and Lister.

[46 L. J. R., Ch. 480 ; L. R., 6 Ch. Div. 87.]

The question is whether this deed is a settlement for value or is voluntary, under 27 Eliz. c. 4, and so invalid against a purchaser or mortgagee.

It was a settlement of real estate, made after marriage, by husband and wife, and duly acknowledged by the wife, whereby the freehold and copyhold property of the wife was conveyed to the trustees and their heirs to the use of the wife for life, with remainder to such persons as she should by will, notwithstanding coverture, appoint, and, in default of appointment, to her children (of whom she had several) in equal shares as tenants in common in fee. Afterwards the husband and wife (by acknowledged deed) mortgaged the property without notice of settlement. Held, that the settlement was not voluntary, but was for value.

It is not voluntary if there is anything in the shape of consideration which can be called value. There were children of the marriage when the settlement was executed; consequently the husband was entitled not only to the estate during the coverture, but also to curtesy if he survived. The wife could not convey, lease, or sell, without her husband's concurrence. This was so before the settlement. After it the husband loses his curtesy. In a sense he retains his estate during coverture, for, strangely, the limitation is not to the wife for life for her separate use; but he gives up his curtesy and the power of preventing the wife from alienating the estate. On the other hand, the wife is reduced from an ownership in fee to a life estate, with testamentary power of appointment. She gains a power of alienation in the sense that she can lease at rack rent and concur in a sale without her husband, the power of sale, which was in the husband, being transferred to the trustees. There was, therefore, value given as between the husband and wife; it is a bargain between them, altering their relative positions, rights, and interests. What one gave up the other acquired, subject to the power of appointment in favour of the children.

In *Goodright v. Moses*, 2 W. Bl. 1019, the point that the husband gave up his life estate, and parted with his control over alienation, thereby giving value, was not argued. The wife also in that case clearly gave value. I entirely differ from the judgment.

Currie v. Nind, 5 L. J. R., Ch. 71; 1 Myl. & Cr. 17, I do not understand or follow, although it is Lord Cottenham's decision; but the case did not call for decision on this point. There neither the husband nor wife gave value, although the husband got an enlarged estate on survivorship.

Butterfield v. Heath, 22 L. J. R., Ch. 270; 15 Beav. 408, I disapprove. The value given in that case by the variation of interests was like that in the present case; and in *Hevison v. Negus*, 16 Beav. 594; 22 L. J. R., Ch. 655, the same judge decided as I now decide. The two decisions cannot be reconciled.

COMMENT.

Teasdale v. Braithwaite, 46 L. J. R., Ch. 725 (App.); L. R., 5 Ch. Div. 630, supports and confirms the above judgment.

In *Speller v. Sedgwick* (not yet reported), L. J., July 21, 1883 (Notes of Cases, p. 98), V.-C. Bacon held that the above cases had no application to a voluntary post-nuptial settlement of real and leasehold estates to which the wife was entitled absolutely for her separate use. The settlement was in favour of the wife and husband for their lives, and then for the issue of the marriage. It was held void, under 27 Eliz. c. 4, as against a subsequent mortgagee. It is to be observed, however, that a husband is entitled to curtesy out of his wife's separate use, and, as her administrator, he takes her undisposed of separate-use personalty. Was not this settlement a variation of these rights? As regards cases affected by the Married Women's Property Act, 1882, it should be remembered that this does not touch the relative rights of the surviving husband or wife on intestate successions. The force of the reasoning as to the alteration effected by such a settlement on relative rights will be apparent on consideration of the effect of bankruptcy thereon. On bankruptcy the trustee would ordinarily take the husband's estate by the curtesy and his rights in the wife's personalty. The trustee's rights would be materially affected by any variation of these estates and interests, but if the transaction stands the test of the Bankruptcy Law (as to which see now 46 & 47 Vict. c. 52, s. 47) it could not be said to be "voluntary" under the statute of Elizabeth.

Ex parte Jarman.

[46 L. J. R., Ch. 485 ; L. R., 4 Ch. Div. 835.]

Where, since the delivery of a solicitor's bill, the solicitor has done more work for the client to the latter's knowledge, and the client has obtained an order to tax the first bill, and for delivery of all papers, that order will be discharged *quoad* the delivery of papers, and the order will be simply to tax.

Re Teague, 11 Beav. 318, overruled.

The solicitor has a lien on all the papers until he is paid all his costs.

COMMENT.

In order that a solicitor may, in general, withdraw one bill and deliver an amended bill, he must prove (1) mistake, (2) accident, or (3) insertion of items from misrepresentation. *Re Holroyde*, 45 J. P. 437, where the M. R. corrected the marginal note to *Re Chambers*, 34 Beav. 177.

Griffith v. Paget.

[46 L. J. R., Ch. 493 ; L. R., 5 Ch. Div. 894.]

If a limited company consists of two or more classes of members having diverse rights *inter se*, and resolutions to wind up the company voluntarily are passed, and for transfer of assets to another company in consideration of shares therein, all that the old company can do under sect. 161 of the Companies Acts, 1862, is to decide on the consideration which shall be accepted for the transfer. It cannot decide as to the mode of distributing that consideration between the classes of members. Such distribution ought, however, to be according to the rights and interests of such members, pursuant to sect. 133. If there is any difficulty in ascertaining these, resort must be had to the Court.

Leach v. Jay.

[46 L. J. R., Ch. 499; affirmed, 47 L. J., Ch. 876; L. R., 9 Ch. Div. 42.]

By will made in 1870, A. R. devised to the plaintiff "all real estate, if any, of which I may die seised." On her father's death, in 1864, certain freehold houses had vested in her as heiress-at-law of her father; but she never had actual possession, which had been wrongfully taken, on the father's death, by her mother, who remained in possession until her death, and purported to devise the houses to defendants, who had entered and held ever since.

The plaintiff brought this action to recover possession. The defendants demurred. Held, that the demurrer must be allowed.

I must ascertain the meaning of the expression used by the testatrix. Technical words must have their legal effect unless a contrary intention can be gathered from the context. The word "seised" is a purely technical word. A. R. was not seised at law or in fact. See Watk. on Descents, 4th ed., p. 40.

COMMENT.

An agreement on marriage to settle "all land of which the husband should be *seised*" was in *Prebble v. Boghurst*, 1 Swanst. 580, held to include copyholds.

Ex parte Fereday.

[46 L. J. R., Ch. 504.]

Where the office of a solicitor, to whom a clerk is articulated, is for a period practically suspended during illness, and the solicitor does not, during the time, take out his certificate, the clerk must serve a corresponding further time. It is not enough that he attended at the office all the time and studied books.

Twycross v. Dreyfus.

[46 L. J. R., Ch. 510; L. R., 5 Ch. Div. 605.]

The tribunals of this country cannot exercise any jurisdiction over foreign Governments as such; nor is there any international tribunal to do so. Foreign bonds, therefore, amount to no more than debts of honour. They are not enforceable by the ordinary tribunals of the foreign country, nor even by the country of issue, without the consent of the Government of that country. Nor can such bonds be enforced here against English agents of the foreign Government having funds belonging to it in their hands, even though such Government, after notice of the action, make no claim to the funds. It would be an indirect assumption of jurisdiction over the foreign country.

Re Burroughes and Lynn's Contract.

[(As varied on appeal), 46 L. J. R., Ch. (App.) 528; L. R., 5 Ch. Div. 601].]

Upon a summons under section 9 of the Vendors and Purchasers Act, 1874, the Court has all the same powers as under a reference to chambers as to the title in a suit for specific performance, including evidence by affidavit and cross-examination thereon. It is thus open to the purchaser to show that the vendor has no title.

COMMENT.

The cases of *Re Coward and Adams*, *ante*, and *Re Turner and Skelton*, *post*, are instances of applications under this section, and of its great utility. Compare the procedure with that adopted in *Jolliffe v. Baker*, *post*, and its advantages are apparent. The only regret is that the section does not apply "where the existence or validity of the contract" is in question. The great need of the public and the profession is to have short and inexpensive methods of enforcing rights. The M. R. always encouraged such.

***In re The Percy and Kelly, &c., Mining Co.,
Hamley's Case.***

[46 L. J. R., Ch. 543; L. R., 5 Ch. Div. 705 (affirmed, *sub nomine Jenner's Case*, 47 L. J. R., Ch. 201; L. R., 7 Ch. Div. 132).]

H. is not a registered shareholder, and therefore can only be so under contract (*Karuth's Case*, L. R., 20 Eq. 506; 44 L. J. R., Ch. 622). The election as a director does not *prima facie* imply a contract with the company to take the shares, but a contract with the company to obtain the shares either from the company or some one else. If the company is so placed that the elected director cannot obtain the shares from any one else, the contract means that he will obtain them from the company; and in that case and in that sense there is a contract to take the shares from the company. If the possession of the shares and being a registered shareholder is a condition precedent to election, and shares are not held at the time, the election is void. The man never is a director. He may incur liabilities for having acted, but he is not a director. No subsequent qualification will validate the election. This man, without qualification, was elected. He says: "I have incurred liabilities, but I have no rights; why should you presume a contract [to take shares] against me?" The only contract you can presume, if any, is a contract to have obtained the shares six months before he became a director, which is impossible.

In re Johnson's Patent.

[46 L. J. R., Ch. 555; L. R., 5 Ch. Div. 503.]

By error of the copyist, a line of the draft specification was omitted from the engrossment filed at the Great Seal Patent Office. Held, that the M. R., as Keeper of the Records, had jurisdiction to set the mistake right. (And see 46 & 47 Vict. c. 57.)

Leathes v. Leathes.

[46 L. J. R., Ch. 562; L. R., 5 Ch. Div. 221.]

A legal tenant for life in possession of freeholds is entitled as of right to the custody of the title-deeds, except where he has been guilty of misconduct endangering the safe custody of the deeds, or where the rights of others intervene, and it becomes necessary for the Court to take charge of the deeds in order to administer the property.

The fact that the tenant for life has resided many years in Australia makes no difference. The suggestion that there is an adverse claimant, and that the tenant for life might show the deeds to him, is based on groundless suspicion. Even if it is proved that the tenant for life has cut timber improperly, that is no reason for depriving him of the custody of the deeds.

Cave v. Mackenzie.

[46 L. J. R., Ch. 564.]

The moment a vendor signs a valid contract, the estate passes in equity to the real purchaser; and the Statute of Frauds enables you to show, by parol evidence, that the real purchaser was not the man named in the contract as purchaser, but that he was only an agent on behalf of the latter. That being proved, the equitable estate is in the real purchaser. That right, and its incident right to sue the vendor for a conveyance, is not taken away by sect. 7 of the Statute of Frauds. It is not a "trust or confidence" of land, because he has not got the land at all [in any character]. He is a mere conduit pipe.

Wilberforce v. Hearfield.

[46 L. J. R., Ch. 584; L. R., 5 Ch. Div. 709.]

A sealed copy of a tithe commutation map is not receivable in evidence on a question of ownership of land. Sect. 64 of the Tithe Commutation Act (6 & 7 Will. 4, c. 71) has no such operation.

Flower v. The Low Leyton Local Board.

[46 L. J. R., Ch. (App.) 621; L. R., 5 Ch. Div. 347.]

Section 264 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), requires a month's notice of intended action against a local authority "for anything done, or intended to be done, or omitted to be done, under the provisions of this Act."

This does not apply to an application for an injunction against a serious and irreparable injury. The object of the section was to enable the authority to make compensation (*The Attorney-General v. The Hackney Board of Works*, 44 L. J. R., Ch. 545; L. R., 20 Eq. 626).

An intolerable nuisance is not to last for one month; and this is not only an action for damages, but a claim for an injunction, which should be granted.

Ex parte **Williamson.**

[46 L. J. R., Ch. 624; L. R., 4 Ch. Div. 581.]

Where there have been three several periods of service under three articles, the first whereof was cancelled by mutual consent, and the second virtually so, within *Ex parte Trenchard*, L. R., 9 Q. B. Div. 406, the Court allows the service to count as continuous service.

In re **The International Patent Pulp and Paper Co.**

[46 L. J. R., Ch. 625; L. R., 6 Ch. Div. 556 (*nom.* Knowles's Mortgage).]

The Court of Appeal has decided, under sect. 43 of the Companies Act, 1862, that, unless a mortgage of the company's property to a director is registered, the director will be unable to avail himself of it as against creditors. I cannot understand why this should be the result. If the mortgage is avoided at all by omission to register, it is so avoided by relation, which is contrary to principle. [The section is a simple direction to keep a register of mortgages of the company's property.] Another principle is that

where a statute provides a penalty for not doing some act, such statutory penalty is the only penalty. There is a penalty of 50% imposed for not registering, whereas I am now asked to impose a penalty, in this case, of 17,500% [the value of the mortgage]. However, in a similar case, I should be bound to follow the Appeal Court decisions, which say that the penalty is the loss of the security. The ground of the decisions seems to be that the director is a person standing in a fiduciary position towards the company, and so specially bound to obey the directions of the Legislature as to a security which he takes, and that the security cannot be set up against the creditors. The rule must, at any rate, be limited in application to directors, solicitors, and officers of limited companies, and cannot extend to persons claiming under them as sub-mortgagees, &c.

COMMENTS.

The decisions of the Appeal Court of which the M. R. disapproved, as above, were *Ex parte Valpy and Chaplin*, L. R., 7 Ch. 289, and *In re The Native Iron Ore Co.*, 45 L. J. R., Ch. 517; L. R., 2 Ch. Div. 345. The question came again before the M. R. in *Re The Globe New Patent Iron, &c., Co.*, 48 L. J. R., Ch. 295. In that case the company had mortgaged nearly all its property to trustees by deed in trust to secure the repayment of money lent to the company. In pursuance of the terms of the deed, debentures for the amounts lent were issued to the lenders. Some of the debenture holders were directors of the company. Neither the trust deed nor any of the debentures had been registered under sect. 43. Held that, nevertheless, the directors were entitled to claim, as against the other creditors, payment of the amount due on the debentures. The M. R. here pointed to the fact that, at any rate, the mortgage was good as to those mortgagees and debenture holders who were not directors, and that no decided case had held that it should be avoided *pro tanto* as against the particular directors. If it was the duty of the directors to enter their mortgage on the register, and omission to do so would be a representation to ordinary general creditors that there was no mortgage, the principle that the directors should lose their security is intelligible. But, if there may be a thousand valid mortgages to strangers, although unregistered, the ordinary creditor does not advance his money on the faith of there being no mortgages. He does not inquire. If there had been no statute and no decision, he said that good equity, equivalent to ordinary common

sense and justice, would not deprive directors making this *bond fide* advance from the benefit of the security.

Sect. 43 shows that the property may be wholly mortgaged without entry on the register, for it speaks of a mortgage not being entered; and if the mortgage was not a good one, the omission would not hurt any one; it is because it is a good one that it requires registration. The section imposes a penalty for non-registration, knowingly omitting registration. "Director, manager or other officer," here means other officer, having authority to direct the omission; *i.e.*, having some control. You do not *permit*, unless you can *prevent*. The words point to the registrar, who is generally the secretary. You can only exact the penalty, as I think, from one within the language. Is it true that, in addition to a specified penalty, there is a superadded equity that absolute forfeiture of rights otherwise legal shall follow a breach of the statutory duty? No; equity has no right to add another penalty ["*Nemo bis vexari pro eadem causa*"]. Equity ordinarily relieves from penalties; in no case inflicts them. If the matter were *res integra*, I should say it is not open to argument.

The M. R. then fully analysed the cases with which he disagreed (*ubi sup.*). As to *Ex parte Valpy* the M. R. pointed out very clearly that the solicitor of the company, as such, could have no control over the register, and therefore no duty imposed on him to register. He was not an "officer of the company."

As to this particular case, the debentures were not the charge, and, consequently, did not require registration. There is no particle of evidence that they "wilfully permitted" non-registration. The officer's duty was not performed in that respect. The mortgagees could not register; it was the duty of the company—the mortgagors—so to do. Why is it void *pro tanto* as to directors? If on the theory of deception, general creditors were not deceived, more or less, because of the accident that some debentures are held by directors.

And in *Re The South Durham Iron Co. (Lim.)* 48 L. J. R., Ch. (App.) 480; L. R., 11 Ch. D. 579, the matter came again before the M. R. (sitting with the Appeal Court) and his colleagues Lords Justices Bramwell and Baggallay. The M. R. again dealt with the question, and Lord Justice Bramwell agreed with his judgment. The decisions of the Appeal Court with which he could not agree, and to which the M. R. did not propose to add, and from which he would not detract, were (1) that a director, &c., could not avail himself of an unregistered security, and (2) but that the security was valid in the hands of any person not occupying these positions. Thus a personal disqualification is created, which must not be extended. Ought the principle to be extended to a partnership, the director implicated being one of them? It appeared to him that the rule of equity compels you to say that you would rather give some

benefit to the defaulter than enforce the forfeiture against those who are innocent; and that the rule ought not to apply to a partnership at all. The argument of inconvenience had weighed with him as to this, for there are many of such large partnerships, as unlimited joint stock companies, &c. Are all the partners in such an undertaking to be punished for the default of one having perhaps a hundred-thousandth part in the concern? Again, if by misfeasance a director has inflicted loss on his company the company has a remedy; but if on his partner-mortgagees, they have none. Personal disqualifications are in equity odious. [Lord Justice Bramwell added that he considered section 43 to imply a *mens rea*.]

It is conceived that the M. R.'s judgments are incontestable, and that the House of Lords would so hold, overruling the cases of *Ex parte Valpy* and *In re The Native Iron Ore Co.*



In re Snell.

[46 L. J. R., Ch. 627; L. R., 6 Ch. Div. 105.]

Where a solicitor acts for mortgagor and mortgagee, he is bound to protect the title of the mortgagee, and cannot claim a lien on title deeds for his costs against the mortgagor. He cannot be heard to say that he has allowed the mortgagee to take a title incumbered with his lien. He must be presumed to have done his duty and to hold the deeds from the time of the advance discharged of his lien.

See also *In re Mason & Taylor*, 48 L. J. R., Ch. 193; L. R., 10 Ch. Div. 729. *Ex parte Calvert*, *In re Messenger*, 45 L. J. R., Bank. 134; L. R., 3 Ch. Div. 317, is distinguishable on the ground that the same solicitor there was retained afresh by the trustee in bankruptcy of the mortgagor whose property was sold subject to the mortgage, and the lien was only claimed as against such trustee, and not as against the mortgagee.

COMMENT.

An appeal was taken on another point in this case, and the Appeal Court held that if journeys taken by the solicitor under general retainer, and without special instructions are ratified by the client, who is known to have acted on the results, the costs of such journeys will be allowed (L. R., 5 Ch. D. 815).

Wright v. The Monarch Benefit Building Society.

[46 L. J. R., Ch. 649; L. R., 5 Ch. Div. 726.]

If the rules of a building society, established under the Act of 1870 (37 & 38 Vict. c. 42), state, pursuant to sect. 16, sub-sect. 9, that disputes between the society and its members shall be settled by arbitration, the jurisdiction of the Court as to such disputes is ousted.

The action in question was one by a borrowing member for an account against the society.

COMMENT.

This case was approved and followed in *Hack v. London Provident Building Society*, L. R., 22 Ch. Div. 103; 52 L. J., Ch., App. 541. The general principle is that a question involving an important dispute as to *liability* will not be referred, while one of *account* will be so.

In re Wheatcroft.

[46 L. J. R., Ch. 669; L. R., 6 Ch. Div. 97.]

Letters received by a solicitor from his client, and copies of letters addressed by him to his client, are the property of the solicitor.

Re Lopez, Ex parte Lopez.

[46 L. J. R., Bank. (App.) 95; L. R., 5 Ch. Div. 65.]

The Court of Bankruptcy has jurisdiction to restrain an action against a compounding debtor in the High Court, in respect of a provable debt, but will not do so where there is a substantial question to be tried in the action, such as whether or not the terms of a composition have been complied with. If an action is clearly vexatious or unfounded, the case would be different.

COMMENT.

An action at law to try a question of a *bond fide* kind, applying only to an objection of one creditor against a composition, will not be restrained (see *Ex parte Watson, Re Watson* (App.), L. R., 2 Ch. Div. 63). The language of sects. 9 and 10 of the 46 & 47 Vict. c. 52, is similar to that in the former Act.

The Mayor of Birmingham v. Allen.

[46 L. J. R. 673 (App.), affirming M. R. ; L. R., 6 Ch. Div. 284.]

The M. R. : Every landowner has a right to the support of his land in its natural state. It is not an easement, but a right of property. Support by whom? The judges have said, "by his neighbour." For this purpose the "neighbour" means the owner of that portion of land, wide or narrow, the existence of which in its natural state is necessary for the support of your land. If you have got on your own land enough, if left untouched, to support your own property, you have the right of support from your neighbour's land, but beyond that have no rights. If your next adjoining owner has a solid strip of land enough so to support yours, although it may be only one foot in width, and then another owner comes in, you cannot sue the latter for any act done. If the owner of the small strip has done anything of a nature to destroy the support, an action lies against him.

Judgment as above affirmed.

COMMENT.

See *Dalton v. Angus*, 6 App. Cas. 740 ; 50 L. J., Q. B. 689. The right of lateral support is within 2 & 3 Will. 4, c. 71, s. 2. The dictum of Erle, C. J., in *Webb v. Bird*, 10 C. B. R. (N. S.) 268 ; 13 *ib.* 841 ; 30 L. J., C. P. 384 ; 31 *ib.* 335, that such statute confined to rights of water disapproved.

Williams v. Jordan.

[46 L. J. R., Ch. 681 ; L. R., 6 Ch. Div. 517.]

A letter, not addressed to any one by name, but only beginning "Sir," was signed by defendants and delivered to the lessor. The letter agreed to take a lease of a theatre at a fixed rent and for a defined term. It is not alleged, and it does not appear, that the writers of the letter knew who the lessor was. An acceptance was sent by the lessor, but the defendants did not sign this nor refer to it in any subsequent communication. This is only an offer to some one not stated. There is no "clear reference" in any other document signed

by the defendants to the letter signed by them (*Warner v. Willington*, 25 L. J. R., Ch. 662; 3 Drew. 523). The defendants are not bound.

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In re The Western of Canada Oil, &c., Co.

[46 L. J. R., Ch. 683; L. R., 6 Ch. Div. 109.]

The examination of a witness before an examiner, under 15 & 16 Vict. c. 86, s. 31, is a private examination. Only the parties and their counsel, solicitors, or agents, have a right to be present.

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Cheavin v. Walker.

[46 L. J. R., Ch. (App.) 686; L. R., 5 Ch. Div. 850.]

After the expiration of his patent, C., patentee of a filter, sold filters marked "C.'s patent filter." W., a rival manufacturer, sold filters made according to the expired patent, marked "C.'s patent filter, manufactured by W."

The M. R. : An inscription in ordinary, and not distinctive, characters, describing that an article is made according to the principle of a patent, is not a trade mark. Again, the plaintiff here represented that the manufacture was protected by an existing patent, and there is no trade mark in a falsehood, which this was. Fraud is the basis of all the jurisdiction in cases like this.

COMMENT.

The false assertion that an article is patented, is now punishable under 46 & 47 Vict. c. 57, s. 105.

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Baylis v. Tyssen-Amhurst.

[46 L. J. R., Ch. 718; L. R., 6 Ch. Div. 500 (Interlocutory hearing.)]

As to the "Lammas lands" here they belong to the owner in fee, are absolutely his for half the year; and, for the other, he is the owner in fee subject to a right of pasturage by other people.

What that right is must be determined by usage, or prescription, which means an implied grant by a former owner of the Lammas lands to those who claim the rights of

pasturage, or their successors. This right is always a right annexed to the ownership of some house. Where it is held in connection with other lands you must have some connection with the lands to make it "appurtenant"—*i. e.* there must be some relationship between the enjoyment of the right and that of the lands. The commonest claim is where the right is in respect of beasts which plough. These are fed in winter from the lands which they plough; and, in the summer, in ordinary commons, they go on the commons. Or the land may be (as here) cultivated until August, and the beasts be then driven upon them in the winter months. There may be various other connections, such as the right to depasture the number which will manure the land. Used in some way on the land it must be to be appurtenant. The right must be appurtenant to "lands," not lands "and tenements," which might include a church steeple. You must allege a season during which the right is to be exercised. It was never regulated at will, the will of people whose interest it is to make it different from what it really may be. That would not be a legal custom. I do not think this can be a legal right—*i. e.* that it can have existed time out of mind. It says that it is in proportion to the annual value of the tenements according to a scale fixed by the homage of the manor. That scale must be constantly varying, and could not be legally referred to the homage of a particular manor in part of a parish to fix. A custom according to "fair annual value" would be different.

As far as possible, judges ought to assume a legal origin for long continued user, and not to destroy the effect of such user on astute technical suggestions; but the pleader must state legal rights, and at the trial I can inquire into them.

Jackson v. The North-Eastern Rail. Co.

[46 L. J. R., Ch. (App.) 723; L. R., 5 Ch. Div. 844.]

Bankruptcy of a sole plaintiff does not now cause abatement of the action, but the bankrupt cannot personally pro-

ceed with it. The trustee may obtain an order, as of course, to continue it.

Kevan v. Crawford.

[46 L. J. R., Ch. (App.) 729; L. R., 6 Ch. Div. 29.]

C., a trader, on his marriage with P., executed a settlement which untruly recited that he was indebted to P. (the intended wife) in 20,000*l.*, and in which he covenanted that he would pay this sum to the trustees of the settlement, to be held on its trusts. The settlement also contained a declaration that, as soon as C. should become owner in fee of certain property, the trustees should lend this sum to him upon mortgage of the property. About two years afterwards, when C. had become such owner, he executed a mortgage to the trustees, but no money actually passed. Three years after the mortgage C. became bankrupt. The evidence showed that the settlement was a scheme by C. to defraud his creditors, but that the intended wife was ignorant of the false recital and of the intended fraud. The trusts of the settlement gave a first life interest in the income to the wife for joint lives of herself and husband, then to him for life (defeasible on his bankruptcy), then for the issue as they should jointly or as the survivor should appoint, and in default to the wife or her representatives.

The M. R.: The settlement was for value given by the innocent wife, viz. the consideration of marriage. Then it is said the only bargain in the settlement is in case the husband paid the money, and that he never paid it. There was no necessity for actual payment. The money was payable, and the trustees say, "Instead of actually paying and getting it repaid to you, execute the mortgage at once." Again, it was a very good mortgage for value, because there was a covenant to pay the money. The trustees forbore demanding immediate payment, and took the mortgage, by way of security on the covenant, to pay at a future date.

The wife joined with her husband in the defence, but this

is no ground for depriving her of her separate costs of suit. *Wright v. Chard*, 4 Drew. 702, was a case of a peculiar kind, but does not touch the general rule. The suit is brought to deprive a married lady of a separate estate. The costs do not go to the bankrupt husband, but to the solicitor who has maintained her right. The suit was also brought against one B., as trustee in bankruptcy of R., who had been a partner with C. in one of his businesses, and inquiries were sought with a view to show some right of R. in the mortgaged premises.

If such a claim is to be asserted, it must be so asserted in a separate action. The Court has no right to investigate a claim, by title paramount, by one co-defendant against another. The authorities for the contrary proposition are cases where a plaintiff obtains relief against a defendant or against defendants, and there are subordinate questions necessary to work out the relief necessary for the benefit of the plaintiff, or to adjust the rights of the defendants consequent on the relief so obtained by the plaintiff where the equities between the co-defendants are worked out by inquiries at chambers or otherwise (see *Chamley v. Lord Dunsany*, 2 Sch. & Lef. 690). There is no case in which any such inquiries were directed where the plaintiff's case wholly fails.

The V.-C. had made an order that the trusts for payment of the interest of the 20,000*l.* after the death of the wife to C. during his life or until bankruptcy, and to accelerate during his life the operation of the other trusts, were fraudulent and void as against his creditors. The M. R. said the order was wholly right, so far as the law was concerned, but that as it amounted to a declaration of future contingent rights the Court would not then make such declaration.

COMMENT.

See now 46 & 47 Vict. c. 52, ss. 29 and 47. Having special regard to s. 55 of the Conveyancing Act, 1881, it is suggested that the *truth* in transactions affected thereby should be compulsorily stated.

Luckraft v. Pridham.

[46 L. J. R., Ch. (App.) 744; L. R., 6 Ch. Div. 205.]

The M. R.: By the Statute of 6 Anne (before the Charitable Uses Act) charitable corporations were enabled to hold lands without licence in mortmain. Then comes the Charitable Uses Act, the object whereof was to prevent heirs from being disinherited by improvident alienations to charitable uses. The substance of the enactment is, that you shall not give lands to charitable uses except by deed properly executed and attested by two witnesses, twelve months before death of donor, and enrolled. Until then there had been absolute power to devise lands by will to charitable uses. The prohibition against such devises has not been repealed. Guardians of the poor incorporated by a special Act enabling them to receive charitable gifts are objects of a "charity" within the Act. Before the General Mortmain Act they had been licensed, by express statute, to receive lands under devise for charitable purposes; but, held that the Mortmain Act applied to them, and that they could not now receive such lands, except as thereby permitted—*i. e.* they cannot take under a will.

The Attorney-General v. The Wandsworth District Board of Works.

[46 L. J. R., Ch. 771; L. R., 6 Ch. Div. 539.]

Where within the Metropolis, as defined by the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), a district board had paved the footpath by the side of a road which had become a "new street" within sect. 105 of the Act, and had, by mistake, paid the cost out of the general rate levied upon the parish, instead of obtaining payment from the owners of adjoining houses and land under that section, as varied by sect. 77 of the Metropolis Management Act, 1862 (25 & 26 Vict. c. 102, s. 77): Held, that the Court would

rectify the mistake by making an order on the district board to levy the amount expended upon the owners of the adjoining houses and land, and to apply the sum received in recouping the general rate.

The principle can be found in the cases in which individual corporators of corporations in existence before the Municipal Corporations Act, being charged with the administration of funds which were subject to trusts for public purposes, were held in equity personally liable for the wilful misappropriation of those funds. Here there is an existing corporation trustee for two sets of ratepayers; such corporation has power, and can be compelled to set right a mistake which involves unfairness to one class of ratepayers.

Hawley v. Steele.

[46 L. J. R., Ch. 782; L. R., 6 Ch. Div. 521.]

This was an action by the occupier of a house on a common adjoining Aldershot camp for an injunction to restrain the general commanding the troops there, and the officers under his orders, from causing rifle practice on the common so as to be a nuisance to the plaintiff and his family. "Aldershot camp" was acquired by the Crown for military purposes under 5 & 6 Vict. c. 94, and is vested in the Secretary of State for War. Held, that he was a necessary party to the action, and that an injunction could not be granted in his absence, as it was not alleged that the defendant threatened and intended to continue the nuisance, or that he could of his own authority control the practice and so continue the nuisance.

No man can plead the command of the Crown if he commits a tort. For instance, the unauthorized order of the general to attack private houses and get bread for his troops would be illegal. The real question is, what is a reasonable user within the legislative authority? Except in the case of an outrageous departure from reasonable use the Courts will not interfere with the discretion of the executive Government.

In re Gerdon's Estate, Roberts v. Gordon.

[46 L. J. R., Ch. 794; L. R., 6 Ch. Div. 531.]

A testator gave his real and personal estate to A. and B., as to the real estate in trust for sale, the proceeds to be considered as part of the personal estate; and gave his personal estate, after the death of his wife (who died in his lifetime), to his son C. absolutely. The testator appointed the said A. and B. executors of his said will. A. died in testator's lifetime. B. renounced probate in the common form. He survived the testator for three years and then died, never having acted as trustee. C. was the heir-at-law of the testator. The testator died seised of a farm which was in part freehold and in part copyhold. C. was never admitted tenant of the copyhold, nor did he take any part in the management of the farm, but received the rents through a local agent for nine years (as his father had done), and then died. C.'s agent during the nine years re-let one farm. Held, that the renunciation of the probate, coupled with the other circumstances, amounted to a disclaimer of the trusts of the will, and that the legal estate, vested in C. as testator's heir-at-law; that C. had elected to take the farm as real estate.

In the first place B. never acted, and inaction for three years is strong proof of intention not to act. Where the real estate is to be sold and made a mixed fund to be applied in paying debts, and the same person is appointed executor and trustee, and the executor renounces *quâ* executor, such renunciation and inaction amount to conclusive evidence of intention to disclaim also *quâ* trustee. If he renounces as to the personal estate he cannot carry into effect the trust for payment of debts, &c.

C. showed an intention to keep the farm as real estate (*Crabtree v. Bramble*, 3 Atk. 680). There is a period of nine years in this case as against two in that. One tenant, who held from year to year, died, and the agent (C. assenting) re-let to his widow from year to year. That being so, he would have been liable to an action by the tenant if the trustees had afterwards exercised the trust for sale and sold

the estate. I am not prepared to say that I should not have similarly decided if there had been no change of tenancy during the nine years. There was no equity as regards the personal representative of C.—no one could call on C. to sell or to keep the estate. When he died, it being land, in order to raise up this equity in favour of the person claiming it as personalty, you must show some contract binding on the estate. “If a real use is impressed upon the property it goes through all the limitations till it is at home in the pocket of the party, or any act is done by him to take off that impression so as to entitle the executor. The slightest act will do” (Lord Eldon, in *Pulteney v. Lord Darlington*, 7 Bro. C.C. 530). I adopt that; but there is no act here showing an intention to convert. On the contrary, I think there are quite sufficient acts even if the estate were in the trustee to show an intention to allow the estate to remain land.

Cadett v. Earle.

[46 L. J. R., Ch. 798; L. R., 5 Ch. Div. 710.]

An authority to invest on the stocks or funds of “the Government of the United States of America, or of the Government of France, or any other foreign Government,” authorizes an investment in the funds or bonds of the separate States of America.

It is said that the maxim *noscitur à sociis* is to be applied, and that the words mean a Government like those of France or the United States of America. Why am I to say that a Government of a peculiar character is meant because two are specified? The funds of Bavaria are those of a “foreign Government;” but the Government of Bavaria, as regards the Government of Germany, is as dependent, in many respects, as is that of Georgia, or Ohio, on the Government of the United States generally.

[Here again the M. R. showed a distaste for the *ejusdem generis* or *noscitur à sociis* doctrines.]

In re Veale's Trusts.

[46 L. J. R., Ch. 799 (affirming App.); L. R., 5 Ch. Div. 623.]

A testatrix bequeathed a fund in trust for a daughter for life, and, after her death, to pay and transfer the same "to and amongst my other children or their issue in such parts, shares and proportions, manner, and form as my said daughter shall by deed or will appoint." Held that this was an exclusive power.

The M. R. : I take the law as laid down by Farwell, p. 294. "Each case must depend on the intention expressed in the particular instrument creating the power; no general rule can be laid down except, perhaps, that the words 'all and every' are mandatory, and make it necessary that each object should have a share (5 Ves. 857), and that 'such' authorizes exclusion unless a contrary intention appear."

The words here, "to and amongst my other children or their issue," imply the power of selecting. The word is "issue" simply—that is, issue without limit. When a class is not readily ascertainable, or cannot be ascertained, the power will generally be considered exclusive.

I disapprove of *Garthwaite v. Robinson*, 2 Sim. 43. Whether *Stolicorthy v. Sancroft*, 32 L. J. R., Ch. 701, was right or not, it does not prevent me from deciding that, in this case, in which the language is different, the power is exclusive.

The Lords Justices affirmed the decision of the M. R.

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In re The Maria Anna and Steinbank Coal, &c. Co. Limited.

[46 L. J. R., Ch. (App.) 819; L. R., 6 Ch. Div. 447.]

People became shareholders in a company, the memorandum of association of which stated that the liability of shareholders was limited, and the nominal capital, 160,000*l.*, divided into 16,000 shares of 10*l.* each; and then, after reciting that there are two debts of 20,000*l.* and 10,000*l.*, contracted on behalf of the company, for which six shareholders had given their joint and several promissory notes, it is

provided in art. 5 that, "if the parties who have signed the above-mentioned notes, . . . or any of them, or the said company, shall be called upon to pay the same principal sums, or any of them, or the interest for the same respectively, and the said company shall not have in hand funds of the said company applicable to the payment thereof of sufficient amount, then . . . each shareholder . . . for the time being shall contribute and pay to the company a proportionate amount of the sum or sums which the company shall be so called upon to pay, according to the number of shares held by each shareholder."

The Companies Act does not avoid the contract, which is one to incur a liability beyond the nominal amount of the shares. Sect. 61 of the Act, providing that, on a winding up, no contribution shall be required beyond the amount unpaid on shares, only affects the debts of the company properly so called—not an arrangement *inter se* of the kind now before us. The words "according to the number of shares" mean according to the number of shares held by such shareholder, having regard to the whole number of shares held. The insolvency of some does not throw the deficiency so caused on the others; the agreement is only to pay the proportionate part, having regard to the original full number of shares. It does not amount to a covenant or agreement that the others will make up any deficiency. There is no general right, in the case of commercial speculations (other than the case of a partnership, with unlimited liabilities as between the partners), to make persons, who agree to contribute a specific proportion of debts, also contribute such further portion as shall make up a deficiency caused by defaulters.

Flower v. Lloyd & Sons.

[46 L. J. R., Ch. (App.) 838; L. R., 6 Ch. Div. 297.]

After the Appeal Court has pronounced a final decision, it cannot rehear the appeal on the ground of fresh discovery of facts leading to the proof that the judgment of the Court had been fraudulently obtained.

The proper course is to commence an original action impeaching the decree. Leave to bring this action would not, in case of fraud, be necessary.

Hughes v. Pritchard.

[46 L. J. R., Ch. (App.) 840; L. R., 6 Ch. Div. 21.]

The M. R. : The testator has used expressions from which the Court ought to collect an intention to dispose of the residue of his real and personal estate. His will begins : "As to my estate which God has been pleased in His good providence to bestow upon me, I do make and ordain this my last will and testament as follows." Then, after giving certain freehold lands, shares, and pecuniary legacies, he concluded, "And I make M. R. and O. my residuary legatees." Held that real estate not specifically mentioned passed to the residuary legatees. The testator says, in effect, "I do, by this my will, dispose of all my real and personal estate, and I give it as follows." I agree that the words "residuary legatees," standing alone, will not apply to anything but the personalty. But I am guided by the expression of intention to dispose of all he had, which is contained in the opening words.

COMMENTS.

So in *Evans v. Jones*, 46 L. J. R., Ex. 280, the words, "or whatever I may be possessed of at my decease," following a disposition of personalty only, was held to carry the real estate of the testator. *Cook v. Jaggard*, L. R., 1 Exch. 125; 35 L. J. R., Ex. 76, was distinguished; and *In re The Greenwich Hospital Improvement Act*, 20 Beav. 458, and *Wilce v. Wilce*, 9 L. J. R., C. P. 197; 7 Bing. 664, were followed.

See, also, *Smyth v. Smyth*, L. R., 8 Ch. Div. 561, where real estate was held to pass under the word "effects" in a residuary clause following a gift of two legacies. And a widow's gift of "all I have power over—viz. plate, linen, china, pictures, jewellery, lace," was held a good residuary disposition of realty and personalty in *In re George's Estate*; *King v. George* (App.), 46 L. J. R., Ch. 670; L. R., 5 Ch. Div. 627.

Carter v. Wake.

[46 L. J. R., Ch. 841; L. R., 4 Ch. Div. 605.]

A pledgee of chattels (*e.g.* railway bonds) without written memorandum is not entitled to foreclosure, but only to sale.

The M. R.: The deposit of title deeds of land is entitled to a foreclosure, because by the deposit an equitable mortgage is created, involving at law transfer of ownership, but this reasoning does not apply to the deposit of chattels who never had the ownership at law. He should order a sale giving plaintiff leave to bid, but he must not conduct the sale.

COMMENT.

It seems to be now settled that an equitable mortgagee of land, either with or without memorandum, is entitled to either a sale or a foreclosure (see *Backhouse v. Charlton*, L. R., 8 Ch. Div. 444; and *The York Union Banking Company v. Artley*, L. R., 11 Ch. Div. 205, and see 44 & 45 Vict. c. 41, s. 25.) A decree for foreclosure of an equitable mortgage ought to contain the word "foreclose," and directions that upon default of payment by the time specified the mortgagor will be foreclosed, the mortgaged hereditaments discharged from all equity of redemption, and that a conveyance from the mortgagor to the mortgagee must be executed (*Lees v. Fisher*, L. R., 22 Ch. D. 284.)

**Ungley v. Ungley.**

[46 L. J. R., Ch. App. 854; L. R., 5 Ch. Div. 887.]

The M. R.: A man, in consideration of the marriage of his daughter, orally promises the intended son-in-law that he will give his daughter a particular house as her portion on the marriage. Immediately after the marriage he puts the couple in the house, and they remain there until his death, intestate. That is a sufficient part performance to take the case out of the Statute of Frauds. The law is, that if the legal owner of an estate puts a stranger in possession of it in pursuance of a verbal contract, that is sufficient part performance. It lets in evidence of the terms of the verbal contract. Possession of a stranger is cogent evidence of some

contract, and equity and good conscience require evidence of its terms. The son and the daughter swear to the gift, and a disinterested witness, the vendor of the property to the intestate, who says the intestate told him that it was to give to his daughter that he wanted the house, corroborates them. As to the 110% which the intestate owed to a building society on the deposit of the deeds, the debt must be paid out of the intestate's general estate. A gift *prima facie* implies (as does a sale) freedom from incumbrances.



Taylor v. The Corporation of St. Helens.

[46 L. J. R., Ch. (App.) 857 ; L. R., 6 Ch. Div. 264.]

The M. R. : A maxim has been cited that, if there is any doubt about the meaning of a grant, it is to be read most strongly against the grantor. According to *Grey v. Pearson*, 6 H. L. C. 61 ; 26 L. J. R., Ch. 473, and *Abbott v. Middleton*, 28 L. J. R., Ch. 110 ; 7 H. L. C. 68, I do not think that maxim has now any particular or special application. You have to find the meaning, and then you do not want the maxim. If you cannot find out the meaning the instrument is void for uncertainty, and in that way you certainly construe it in favour of the grantor, because you annul the grant.

The grant is of "all and singular the watercourses, dams, reservoirs, and intended reservoir in or upon the lands of T., which . . . are described . . . in the plan annexed to these presents, &c., which plan is to form a component part of these presents." This is a grant of a watercourse. Such a grant may mean : (1) the easement of, or right to, running water ; (2) the channel which contains the water—*e. g.* the water pipe or drain ; (3) the land over which the water flows. Which it does mean the context must show. If there is no context it means the easement only. In this case I think the word "watercourse" means a corporeal hereditament, and not merely the easement, and that it includes the channel through which the water runs—in this case an artificial

channel made by man. It conveys not merely the pipe or drain, but the water in it. The following words: "And also the several springs or streams of water flowing into it or feeding the said watercourses, &c.," mean the grantor's own streams or springs—springs from a definite source. A stream does not include the percolation below ground. It is that which, while running ordinarily in a defined channel, is capable of diversion. Whatever gets into the watercourse passes under the word "watercourse," but in no other way. If you grant a containing vessel with the fluid in it, you only grant that vessel and that fluid—you do not grant the right to any fluid which the man may put in it with the right of getting it out again. The grantee takes the fluid because it is in the vessel; he may not enlarge the vessel. There is an exclusive grant of a right of user, and a reservation of mines. That reservation shows that the springs and streams intended must be those in a distinct locality. You could not speak of mines under springs and streams if you meant little dribblets of water percolating through the surface after a shower.

The grant was restricted to a grant of the watercourse in its actual state, and to such water as could be conveyed by the watercourse. Therefore the grantees had no right to alter and extend the watercourse, as they have done by enlargement of the culvert, &c.

In re **Brook's Mortgage.**

[46 L. J. R., Ch. 865.]

Sect. 4 of the Vendors and Purchasers Act, 1874, does not enable the personal representative of a mortgagee to convey the legal estate of the mortgaged property to a transferee of the mortgage. [Also *Re Spradberg's Mortgage*, 14 Ch. Div. 514.]

[This section is now repealed and superseded by sect. 30 of the Conveyancing Act, 1882, as to deaths after December 31, 1881.]

Lindsay v. Ellicott.

[46 L. J. R., Ch. 878.]

Personal estate which a lady had brought into settlement on her marriage was limited in an event which happened upon trust "for the person or persons (exclusive of W. F. and his representatives), who, under the Statute of Distribution would have become entitled thereto if the said (lady) had died possessed thereof a *feme sole* and intestate." W. F. was the lady's eldest brother. At the lady's death her statutory next of kin included three daughters of W. F.

The M. R. : The question is whether the children of W. F. are excluded, or whether the word "representatives" means personal representatives. In my opinion the word here meant beneficial representatives. The cases as to the primary meaning of the word, and the dicta of V.-C. Kindersley in *Crauford's Trusts*, 23 L. J. R., Ch. 625 ; 2 Drew. 230, do not apply to persons who take derivatively, under the Statute of Distributions. Where you have a class who take under this statute, and some are dead, another generation take, and so take by representation. They represent the dead members of the class. In this case the word "representatives" does not mean the next-of-kin of W. F., but those who represent W. F. as next-of-kin of the lady settlor. Sects. 6 and 7 of the Statute of Distributions show that the children of W. F. represent the stock of W. F. The daughters of W. F. are excluded.

Stead v. Mellor.

[46 L. J. R., Ch. 880 ; L. R., 5 Ch. Div. 225.]

A testatrix bequeathed all her personality to her executors on trust to convert it into money, and, after payment of debts and certain legacies, to hold the residue "in trust for such of my nieces, A. and B., as shall be living at my death, my desire being that they shall distribute such residue as they think will be most agreeable to my wishes." Held, that A. and B. were beneficially entitled.

The M. R. : If I found the same words here as in *Briggs v. Penny*, 21 L. J. R., Ch. 265 ; 3 Mac. & G. 546, I should probably, but not necessarily, follow Lord Truro's decision there. I say not necessarily, because *Gibson v. Fisher*, 37 L. J. R., Ch. 67 ; L. R., 5 Eq. 51, decides that, on another testator's will, the Court is not necessarily bound by a previous decision on the same words in another will. I may remark that *Briggs v. Penny*, often cited, has never been actually followed. I might not, perhaps, have similarly decided it. The reason given for the decision, viz., that the testatrix assumed that her views and wishes were already, or would thereafter, be made known to the legatee held to be bound by the expression, "well knowing that she will dispose of it in a manner in accordance with my wishes," is most unsatisfactory. So the Lord Chancellor reasoned that the fact that the legatee there took other legacies beneficially, showed that the residue, to which the precatory trust was held to be attached, was not intended for her beneficially. That is also, to my mind, unsatisfactory. For a residue is a chance thing, and it is, therefore, natural enough to give a pecuniary legacy of defined amount, and then the residue (on the same footing).

In the present case the testatrix shows that she knew how to create (an express) trust ; for she created it. (It is, therefore, very improper to *imply* trusts here.) The matter is left to the inclinations of the legatees, and they are made absolute judges of the mode of distribution. There is no pretence for saying that there is a trust.

COMMENT.

The M. R. also held, in *Re Hutchinson and Tenant*, L. R., 8 Ch. Div. 540, that a gift to a wife "absolutely, with full power to dispose of the same as she may think fit for the benefit of my family, *having full confidence that she will do so*," was an absolute gift. See also, in *Re Adams*, 52 L. J., Ch. 758. The decisions of Malins, V.-C., in *Curnick v. Tucker*, L. R., 17 Eq. 310, and *Le Marchant v. Le Marchant*, L. R., 18 Eq. 414, are in effect over-ruled by *Lambe v. Fames*, L. R., 6 Ch. 599 ; 40 L. J. Ch., 447.

Dawson v. The Bank of Whitehaven.

[46 L. J. R., Ch. (App.) 884 ; L. R., 6 Ch. Div. 218.]

A woman, married before the Dower Act, joined in a mortgage by her husband of his freehold to release her dower, the equity of redemption and trusts of surplus arising from a sale being reserved to the husband, his heirs, executors, and assigns. Held, that the equity of redemption was not charged with the amount of dower against an assign of the husband claiming under assurance subsequent to the mortgage.

The M. R. : The case is governed by the old law. The question is whether, under it, when the wife joined the husband in levying a fine, and then mortgaged the estate in fee, dower, which was destroyed at law, subsisted in equity for any purpose ; and especially whether she had any equitable right against her husband's estate in respect of the inchoate right of dower, destroyed at law. No such claim as the present has ever before been made. As to dower, equity did not follow the law. There was no dower of an equitable estate. The fine destroyed the dower at law by changing the seisin, the use of the fine being to the mortgagee in fee. Where is the equity to revive it ? It was a voluntary changing of the husband's legal to an equitable estate. She must be taken to have known that the inchoate right to dower did not attach to an equitable estate. Extinguishment at law operated as extinguishment in equity, because dower did not exist at all in equity. The observations of Vice-Chancellor Sewell in *Jackson v. Parker*, 2 Amb. 687, only mean that the form of the deed there gave her the right to redeem, the form of reservation of the right of redemption, giving her an estate as tenant by entirety, and, if she survived, she could have redeemed under that. Then, having redeemed, the Court could not take the estate from her without giving her dower. Lord Redesdale meant no more in *Jackson v. Innes*, 1 Bligh, 104.

Henderson v. Maxwell.

[46 L. J. R., Ch. 891; L. R., 5 Ch. Div. 892.]

A publisher, before publication, entered at Stationers' Hall the intended date of publication of the first number of a magazine, which was also the actual date. Held, an insufficient compliance with sect. 13, 5 & 6 Vict. c. 45, and that no copyright was acquired in a tale appearing in such magazine under sect. 18.

The Act contemplates two things:—1. That the person making the entry shall be the proprietor of the copyright. 2. That the book or subject of copyright is something which has been already published, from which it follows that no man can make an entry who is not the proprietor of something already published. The Act only protects what is already given to the world. Sect. 18 cannot apply to a periodical not published.

In re Ware, ex parte Drake.

[46 L. J. R., Bank. App. 105; L. R., 5 Ch. Div. 867.]

The judgments in *Brinsmead v. Harrison*, 40 L. J. R., C. P. 281; L. R., 6 C. P. 584, show that the theory of a judgment in detinue is that it is a kind of involuntary sale of the plaintiff's goods to the defendant, the Court giving the plaintiff the next best thing—viz., the value of the goods. If he does not get that value the property remains in the plaintiff, and he has a right to recover it by legal process wherever he finds it—*i. e.*, while the judgment remains unsatisfied the property remains in the plaintiff.

If the defendant becomes bankrupt and the plaintiff merely proves his debt under the liquidation or bankruptcy proceedings, he does not abandon his property in the article which is the subject of the action. Nothing was here done under the proof, no vote upon it took place, and it was not either formally accepted or rejected by the trustee. The trustee took the mare, which was the subject of this action, and sold it, and within a reasonable time from his discovery of the

facts, the plaintiff claimed to be paid his judgment debt out of the proceeds of sale of the mare. The proper order is that which we make, for delivery of the mare to the plaintiff. But as he might have obtained the order from the Court of Bankruptcy instead of by ordering the sheriff to take forcible possession, as he did, he will not be allowed costs.

If the liquidation had not intervened, the plaintiff could have obtained an order for delivery of the mare, under sect. 78 of the Common Law Procedure Act, 1854; and as it did intervene, the same order could have been obtained in bankruptcy.

Re The Norton Iron Company.

[47 L. J. R., Ch. 9.]

A creditor, who, with notice that another creditor has presented a winding-up petition, presents a similar petition, does so at the risk of having his petition dismissed with costs, unless he can prove that collusion between the first petitioner and the company actually exists. But if he can prove that he had reasonable ground for suspecting collusion as to the other petition, he may proceed with his own, and will be allowed his costs. *In re The General Financial Bank*, L. R., 20 Ch. Div. 276; 51 L. J., Ch. 490.

[Where two petitions were advertised in the same *London Gazette*, but one was presented a day before the other, although advertised in a later page of the *Gazette*, the conduct of the winding-up order was given to the petitioner whose petition was first presented. *In re Storforth Lane Colliery Company (Lim.)*, 48 L. J. R., Ch. 416; L. R. 10 Ch. Div. 487.]

Hunt v. The City of London Real Property Company.

[47 L. J. R., Ch. (App.) 51; L. R., 2 Q. B. Div. 605.]

Where an action is commenced in the Chancery Division, and sent for trial by jury to one of the common law divisions, a Divisional Court is the proper Court before which to make an application for a new trial.

A judge need not make an order stating reasons why it is not expedient to try the action in the Chancery Division.

Willis v. Kymer.

[47 L. J. R., Ch. 90 ; L. R., 7 Ch. Div. 181.]

The question is whether, where a precatory trust has been created by will in favour of "children," *simpliciter*, the trustee may, in executing the trust, limit the shares of the daughters to their separate use. I am of opinion that this may be done.

Kelland v. Fulford.

[47 L. J. R., Ch. 94 ; L. R., 6 Ch. Div. 491.]

Real estate, to which an infant was entitled in fee simple, was taken by a railway company, and the purchase-money (over 200*l.*) was paid into Court under section 69 of the Lands Clauses Consolidation Act, 1845. Held, that the purchase-money was to be treated as real estate, and that, on the death of the infant, his heir was entitled.

More than half the persons named in the section have unsettled estates. The application of the money is to be in the "purchase or redemption or the discharge of any. . . . incumbrance affecting the land in respect of which such money shall have been paid, or affecting other lands 'settled' therewith to the same or like uses." Here settled merely means "standing limited," otherwise it would not apply to more than half of the cases. The whole section is intended to keep parties who may be under disabilities or otherwise in the same position.

***In re* Mercerin's Trusts.**

[47 L. J. R., Ch. 114 ; L. R., 7 Ch. Div. 184.]

The Court has jurisdiction, under sections 84 and 89 of the General Metropolitan Paving Act, to order a district board of works to pay the expenses of investment in consols of the purchase-money of lands taken by the board by agreement in pursuance of the Act.

Selby v. Whittaker.

[47 L. J. R., Ch. 121 ; L. R., 6 Ch. Div. 239.]

A testator bequeathed a sum of money to trustees upon trust for investment and payment of the dividends in moieties to his two daughters, A. W. and J. W., respectively for life, and, after their respective deceases, leaving issue, or other lineal descendants, her or them surviving to pay, assign, and transfer the principal unto her child or children, or other lineal descendants, *per stirpes*, as they should respectively attain twenty-one, but the shares of the children to be absolute vested interests immediately on the decease of their parent, and transmissible to their executors or administrators respectively, with a gift over in case of the death of either daughter without issue or lineal descendants her surviving. Three of A. W.'s children died in her lifetime without issue. Held, that their representatives were not entitled to share in the trust fund.

The M. R.: The gift to the children is clearly contingent on their surviving the parent. The only gift is a direction to pay and transfer at twenty-one. The testator is imagining that there will be some person to accept the payment after the death of the daughters. Then the gift to the child or children is to them altogether as a class. They take separate shares at different times. It is not necessary to a class gift that every member shall take the same share or at the same time. Then there is the express direction as to the time of vesting. The indications of intention to make the gift contingent are cumulative and conclusive.

**Winn v. Bull.**

[47 L. J. R., Ch. 139 ; L. R., 7 Ch. Div. 29.]

An agreement in writing to take a lease of a house for a certain term, at a defined rent, contained a stipulation: "This agreement is made subject to the preparation and approval of

a formal contract." Held, that there was no agreement of which the Court could enforce specific performance.

The M. R. : If on a proposed sale or lease of an estate two persons agree to all the terms, but say : " We will have them put into form ;" then, all the terms being agreed to and put into writing, there is a contract. But, if they agree in writing that the terms up to a certain point shall be the actual terms, but that some minor terms shall be settled by solicitors and approved by them, then there is no contract, because all the terms have not been settled. The distinction is that pointed out by Lord Westbury in *Chinnock v. The Marchioness of Ely*, 34 L. J. R., Ch. 399 ; 4 De G., J. & S. 368. " If there has been a final agreement, sufficiently evidenced, the agreement shall be binding although the parties may have declared that the writing is only to serve as instructions for a formal agreement, or although it may be an express term that a formal agreement shall be prepared." " But if to a proposal or offer an assent is given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation."

COMMENT.

See and compare *Hussey v. Horne Payne*, 48 L. J. R., Ch. 846 ; L. R., 4 App. Cas. 311 ; and *Eadie v. Addison*, 52 L. J. R., Ch. 80.

The result of the decisions seems to be that if the only term left open is that the agreement to buy an estate is " subject to the title being approved by our solicitors," or the offer to take a lease contains the words, " A proper lease to be drawn up with all proper clauses and approved of by me and my solicitor, and executed before the commencement of tenancy ; and, if not, this offer be void," and such offer is accepted without variation, the contracts in each case will bind, and the Court will exercise the function of the solicitor, and take care that a good title is given or a proper lease made. Where the Court can do justice in matters so strictly within its province as the consideration of a title, or as to what are " usual and proper " covenants in a lease, it will do so. It has already to do so in the frequent case of agreement for a lease with " usual " covenants, and there are numerous decisions on these very words. But it is conceived that *Winn v. Bull* is still good law—i. e., that where the very

terms by which at least one of the parties intends to be bound are left in uncertainty, or where the preparation of a contract is plainly made a condition precedent, there is no contract until and unless the terms are settled or the contract signed. See also *Harvey v. Barnard's Inn*, 50 L. J., Ch. 759; 45 L. T. 280, and *Donnison v. Café Co.*, 45 L. T. 187.

Harrison v. Jackson.

[47 L. J. R., Ch. 142; L. R., 7 Ch. Div. 339.]

The doctrine of ademption of specific legacies more often than not defeats the intention. But the law is that a specific legacy is adeemed when its subject matter has been aliened by the testator in his lifetime. The testator has sold this stock, and bought something else with the money. There is no difference whether that money was applied to buy shares, or horses, or anything else. He has applied his own money to buy something which is not the specific article bequeathed by him. I disapprove of *Le Grice v. Finch*, 3 Mer. 50, and of *Clark v. Broigne*, 2 Sm. & G. 524. If the first case is right it must follow that, to whatever article you trace the disposition of the money, which is the produce of the original specific legacy, that article would pass. In the second case the Vice-Chancellor adopted the rule of the civil law erroneously; for the testator did not "set apart any specific fund to be expressly reserved for the legatee," and hence the civil law had nothing to do with it.

If a man, by will, gives a debt, and he is paid that debt in his lifetime and with the money buys a horse, the horse does not pass.

Campbell v. Holyland.

[47 L. J. R., Ch. 145; L. R., 7 Ch. Div. 166.]

Everyone who takes under an absolute order for foreclosure must be assumed to know that the Court has still a discretion

to allow the mortgagor to redeem. The cases in which the Court will exercise that right depend on the circumstances of each case. In the first place, the mortgagor must come promptly—that is, within a reasonable time. Where it is an estate in possession, and the mortgagee, under the decree proceeds to alter and improve the estate, &c., the mortgagor must come much more quickly than when the mortgage is of reversionary property. Then such circumstances as whether the mortgagor had a reasonable expectation of getting the amount from a certain source, but was disappointed at the last moment; and whether it was a very large sum; and the nature of the property, as regards its real value and the amount of the mortgage upon it relatively considered, must be fairly weighed. Again, it may be an old family estate or a chattel with a *pretium affectionis* as far as the mortgagor, and he only, is concerned. Or it may be (as here) that the property, though a reversionary interest in the funds, is of special and not merely money value to both litigants, having regard to some other litigation and to the nature of a title connected with it, although (as here) the property is not proved to be of much more money value than the amount in which it is mortgaged.

As regards interference with purchasers from the mortgagee, there are purchasers and purchasers. One may buy fairly long after a foreclosure decree, and with no notice of any extraneous circumstances affecting the matter, and another may buy within twenty-four hours of the decree being made absolute with such notice. The present purchaser bought for a collateral object, and he had verbally agreed to buy even before the decree was made absolute. Again, the mortgagor had also agreed to buy the property from the mortgagee under what he thought was a valid contract; but the judge decided that the other purchaser had the better contract. Then the mortgagor at once made this motion.

I open the foreclosure, and allow the mortgagor to redeem.

Wilkes v. Saunion.

[47 L. J. R., Ch. 150; L. R., 7 Ch. Div. 188.]

In an action for redemption of a mortgaged ship, mortgagees are entitled as "just allowances" to the expenses of a proper seizure of the ship, advertising it for sale, and effecting insurances.

Tipton Green Colliery Company v. Tipton Moat Colliery Company.

[47 L. J. R., Ch. 152; L. R., 7 Ch. Div. 192.]

Mortgagees in possession will be allowed for "necessary repairs" executed, under the words "just allowances." For permanent or substantial improvements alleged to have been made by them to be allowed, they must be asked for specially, and be proved to have been made.

Read v. Bailey.

[47 L. J. R., Ch. (H. L., affirming the M. R.) 161; L. R., 3 App. Cas. 94.]

This case is in effect an approval and establishment of the principle of *Ex parte Sillitoe*, 1 Glyn & J. 374.

It is that the bankruptcy rule to keep the joint and separate estates of a firm, and an individual member of such firm (who are both bankrupt), distinct, does not apply where one partner has defrauded the firm by withdrawing partnership assets.

In re Cigala's Settlement.

[47 L. J. R., Ch. 166; L. R., 7 Ch. Div. 351.]

By a settlement made on the marriage of a female British subject with a foreigner, a sum of 3 per cent. Rentes, and some shares in the Bank of France, the wife's property, were vested in trustees, three of whom were British subjects. The

husband and wife, in exercise of a power contained in the settlement, appointed the trust funds, subject to their own life interests, amongst their children, who were domiciled foreigners. Both parents having died, held, that the funds were liable to succession duty.

The M. R.: "Property," in sect. 2 of the Succession Duty Act, includes this. The tax is in many cases payable by foreigners, as in the case of a British subject leaving English property to a foreigner. There *mobilia sequuntur personam*. This is movable property, and there is in this settlement, made in England, in English form, of English property, in English language, and three of the trustees being English, a power to change the investments for English securities. The forum is English, since the children are obliged to come here to ask for the money, and the trustees could only have been sued in this Court.

Re Albion Steel and Wire Company.

[47 L. J. R., Ch. 229; L. R., 7 Ch. Div. 547.]

Section 10 of the Judicature Act, 1875, only assimilates the rules to be observed in winding up a company to those previously existing in bankruptcy so far as relates to the mode of proof, and the debts provable. It does not extend to give to any debts such right of preferential proof as they would have had in bankruptcy.

Hampshire v. Wickens.

[47 L. J. R., Ch. 243; L. R., 7 Ch. Div. 155.]

A covenant in a lease of a house against assignment, underletting, or parting with the possession of premises without consent, such consent not to be withheld as to a respectable tenant, and not, without consent, to put up bills as to letting apartments, is not a "usual" covenant. It is, however, said that this is less extensive than a general and unrestricted covenant not to assign. I assent to this, and

hold, as was also held by the Appeal Court in *Hodgkinson v. Crouce*, 44 L. J. R., Ch. 238, 680; L. R. 19 Eq. 591, 10 Ch. 623, that such a general covenant is not a "usual" covenant. *Haines v. Burnett*, 29 L. J. R., Ch. 289; 27 Beav. 500, is wrong in principle and authority, and is overruled.

"Usual" covenants may vary from time to time according to the knowledge of mankind for the time being. The "usual" lessee's covenants at present are thus stated in the last edition of Davidson's Precedents, vol. 5, part 1: (1) To pay rent, (2) to pay taxes except landlord's taxes, (3) to keep and deliver up the premises in repair, and (4) to allow the lessor to enter and view the state of repair, (5) a clause for re-entry in default of payment of rent [not on bankruptcy, *Hodgkinson v. Crouce*, *supra*].

And the lessor's "usual" covenant is the qualified one for quiet enjoyment.

***In re* The Wedgwood Coal and Iron Company,
Anderson's Case.**

[47 L. J. R., Ch. (App.), 273; L. R., 7 Ch. Div. 75.]

If a man contracts for paid-up shares with a company, and there is no other contract—*i. e.*, no previous contract to take shares at all—and the company allots the paid-up shares, and the contract is registered under section 25, neither party can alter the contract, independently of any equitable grounds which may exist to set it aside. As to such equitable grounds, I instance a person holding a fiduciary position towards the company entering into such a contract as he cannot fairly be allowed to enforce. Then the company may either (1) ask the Court to set aside the whole contract, in which case the shares would not be allotted at all, and the consideration would have to be returned, or (2) the company may treat the fiduciary as a trustee for the company of the profit made by the contract, and may take that profit from him—not altering the nature of the allotted shares.

Contemporaneous documents executed and assented to by the same persons at the same time are to be read together, so that any ambiguity in one may be explained by the other; and, even if there is any inconsistency between them, the inconsistency may be explained by taking the documents jointly.

When Lord Justice Mellish said in *Crickmer's Case*, 44 L. J. R., Ch. 595; L. R., 10 Ch. Div. 614, that you cannot have a contract under sect. 25, unless it is "external" to the company, he meant one which was not part of the original constitution of the company, and that the person contracting must be external to the company—*i. e.*, external in the sense of not being one of the members of the company merely co-operating in the formation of the company.

COMMENT.

As regards the conditions which are required by the Companies Act to be stated in the memorandum, the articles cannot be referred to for the purpose of modifying or qualifying them. The M. R.'s observations as to the power to explain contemporaneous memorandum and articles by one another are confined to matters not required to be stated in the memorandum. See *Guinness v. Land Corporation of Ireland*, L. R., 22 Ch. Div. 377.

In re Cardross's Settlement Trusts.

[47 L. J. R., Ch. 327; L. R., 7 Ch. Div. 728.]

Under a marriage settlement of the lady's personalty, made with the sanction of the Court, the lady being seventeen years old, a power was given to her as first tenant for life to consent to any change of investments. Held, that she might so consent while a minor.

It must have been contemplated that some change might be desirable in four years. I adopt the passage in *Prest. Abs. p. 326*: "An infant may exercise a power coupled with an interest if his infancy be dispensed with, or if from the nature of the power it is evident that it was in the contemplation of its author that it should be exercised during minority."

COMMENT.

In *In re D'Augilau, post*, L. J. Cotton somewhat dissented from this decision. See also *Re Duke of Newcastle's Settled Estates*, 52 L. J., Ch. 645; and *The Settled Land Act*, 1882, ss. 3, 6, 17, 33, 56, 58, and 60.

Re Marriott (Deceased), Moors v. Marriott.

[47 L. J. R., Ch. 331; L. R., 7 Ch. Div. 543.]

The secretary and manager of a benefit building society established and certified under 6 & 7 Will. 4, c. 32, with rules providing for the inspection and auditing of its officers' accounts, having, as such officer, obtained possession of monies of the society and misappropriated them, died insolvent. Held, that his estate was liable, under 4 & 5 Will. 4, c. 40, s. 12, to discharge the claim of the society for such monies before any other creditors could be paid, and the negligence of the company in not having audited the accounts was no answer.

COMMENT.

The statute in question was repealed by the 18 & 19 Vict. c. 63, and the 6 & 7 Will. 4, c. 32, was repealed by the 37 & 38 Vict. c. 42, s. 7, as to any society obtaining a certificate of incorporation under the last-mentioned act. See also 38 & 39 Vict. c. 9, and 40 & 41 Vict. c. 63.

Krehl v. Burrell.

[47 L. J. R., Ch. 353; L. R., 7 Ch. Div. 551; affirmed 48 L. J. R., Ch. 252; L. R., 11 Ch. Div. 146.]

A defendant had full notice of the claim to a right of way which was established at the hearing. Notwithstanding that he put up a solid and expensive structure over the site of the right of way, and then offered a substituted way. Held, that a mandatory injunction for removal of the structure should issue.

The Court is not to enable a rich man to buy a poor man's property without his consent. If I withheld the injunction I should add one more to the number of instances which we

have from the time when the Bible was written until now, in which the man of wealth has endeavoured to deprive his poorer neighbour of his property, with or without adequate compensation.

—♦—

Cooper v. M'Donald.

[47 L. J. R., Ch. (App., affirming the M. R.), 373; L. R., 7 Ch. Div. 288.]

The M. R.: A separate use standing alone gives the wife the power of disposition as if she were a single woman. It has a meaning attached to capital as well as to income. As regards capital, it both secures the income to the wife and gives her the power of alienation. A gift of a fee simple estate or of a capital sum to a married woman for her separate use gives her the same power of alienation as if she were a single woman; and the husband has no interest. The separate use is a creature of equity which says that property may be so limited as to enable the woman to get rid of every possible interest of the husband. It is the same for this purpose as if the property had been limited to such uses as she should by deed or will appoint. The fetter imposed by restraint on anticipation is merely intended to secure the property to her; it does not, if imposed in respect of real estate otherwise hers in tail, deprive her of the right of enlarging the estate tail into a fee. This she did by deed duly enrolled, in which the husband concurred, as was necessary under section 40 of the Fines and Recoveries Act. The concurrence is necessary, because the separate use (whatever else it may do) could not, *per se*, enable the married woman to convert a fee tail (which is the subject of special legislation) into a fee simple. Then the husband became bankrupt, and, it was said, was entitled to an estate by the curtesy, and could not concur after his bankruptcy. As regards that, if the wife had never alienated, but had died tenant in tail or in fee in equity, curtesy would have attached, whether the estate was merely equitable either with the separate use, or equitable without the separate use. But

the Bankruptcy Act does not prevent the husband from concurring in this, his *wife's* (not his), statutory disposition.

For with the notable exception of dower, before the Dower Act, equity follows the law, in the incidents of estates, and gives the same curtesy out of equitable as out of legal estates. When the wife died intestate her husband would take something, and her eldest son something, both as equitably entitled. The property would descend to the eldest son subject to the curtesy of the husband; so far equity follows the law. Then comes the separate use, engrafting something on the equitable estate. It took away the husband's right to the income during the coverture, and gave the wife the absolute ownership during the coverture, and, if the separate use attached to the fee, it gave her the absolute power of disposition without her husband. This right, therefore, entitled her to dispose of it as much against the husband's estate by curtesy as against the son's estate as heir. But there is no reason for carrying it further. If she dies without disposing of it the separate use is exhausted, so to speak. She has had the income separately; and if she has not chosen to exercise her power of disposition, why should equity interfere further with the devolution of the estate? Why should it prefer the eldest son to the husband? It should not. The rights of the husband and the heir are in that case equally unaffected.

The Lords Justices: We cannot dissent from the judgment of the M. R.

COMMENTS.

It appears to be considered that there is nothing whatever in the Married Women's Property Act, 1882, to affect the devolution upon an intestacy of realty and personalty to which a married woman is entitled for her separate use. That is to say, that, as to real estate, the husband takes his curtesy and the heir-at-law takes subject thereto; and, as to personalty undisposed of, the surviving husband would take, as her administrator, the statutory "separate property" vested in a married woman under section 1 of the new Act. Probably the contingency of a default of an alienation on the part of the married lady is not sufficiently considered on the occasion of arrangements upon marriage. No legislation can make a married lady a free agent at

all times. Thus, if the lady has the larger possessions, it does not seem right that in the event of her death within, say, one year of the marriage, intestate, but having had a child, the husband should take a life estate by curtesy in the lands, and all the personalty. To prevent this it appears to be only right that there should, in such cases, be provisions in the settlement excluding curtesy and marital rights on intestacy in the personalty. Otherwise, all the object of the Act or of the idea of a separate use as pre-existing may be defeated. If the wife finds it desirable to benefit the husband she can do so, but, even if otherwise, she will have necessarily much relieved the husband's purse during the marriage. It is as competent to the husband to exclude his curtesy and rights as his wife's administrator as to the wife to exclude her dower, and I therefore suggest that clauses as above should be inserted in order to thoroughly effectuate the separate use. The rights of the wife in the estate of an intestate owner of realty and personalty cannot be said to be commensurate with those of the husband in the intestate wife's realty and personalty. She takes a third of the personalty only, where there are children, and dower, in the rare cases in which it can be claimed, is not to be compared with curtesy. The principle sought to be attained now is one of absolute equality between man and wife as to their relative possessions. If, however, the various incidents attaching to the fact of marriage, but not arising until the deaths of the parties intestate, are left out of consideration, this will not be attained. It is the great fault of our legislation that it has often not sufficient regard to the existing law—the growth of a somewhat complicated system.

In the case of *Re Jakeman's Trusts* (L. R., 23 Ch. Div. 344; 52 L. J., Ch. 363), Chitty, J., said that the effect of the decision in *Cooper v. Macdonald* was that the married woman having, with the concurrence of her husband, barred her estate tail and thus enlarged it into a fee simple, was enabled, as the result of that disposition, to devise the property by will, so that the husband's concurrence enabled the wife alone to defeat the curtesy which he would otherwise have had. The bankruptcy of the husband did not preclude him from joining in the deed with the above result. Chitty, J., held that the execution by the husband of a deed in favour of creditors stood on the same footing in this respect as a bankruptcy. In *Hole v. Escott* (4 My. & Cr. 187) the only question was whether the husband could join with the wife in execution of a power given by deed. There it was the disposition of the husband as well as the wife. Here it is the wife's property and the wife's disposition.

The surviving husband may also, in many cases, get the benefit of the statutory fiction introduced by sect. 33 of the Wills Act. See *Pearce v. Graham*, 1 N. R. 507; 32 L. J., Ch. 359; explained in *In re Hone's Trusts*, L. R., 22 Ch. Div. 663.

Re The Accidental Death Insurance Company.

[47 L. J. R., Ch. 396; L. R., 7 Ch. Div. 568.]

As regards payments by contributories to an unlimited company, registered under 7 & 8 Vict. c. 110, under compromises made with the official liquidator pursuant to the Companies Act, 1862, s. 160, and Rules of 1862, Schedule 3, Form 50, the amounts received under compromises being less than that remaining unpaid on shares of compromising contributories, and a further sum being required to pay costs of winding up, the sums received from such compromising creditors is applicable to pay debts, and the sum required for costs must be made up by the contributories who have not compromised.

Middleton v. Brown.

[47 L. J. R., Ch. (App.) 411.]

B. was employed by A., an oil merchant, at a weekly salary of 1*l.* 1*s.*, to go about London and sell oil for him. In consideration of the engagement B. agreed not, for twelve months after termination of the employment, to sell oil within a radius of eight miles from the General Post Office. After a year's employment B. determined the agreement, and then commenced to sell oil within prohibited limits on his own account. Held, that A. was entitled to an injunction against B., and that the agreement was not a "hard bargain." A "hard bargain" means an unconscientious bargain—one in which unfair advantage is taken of the position of one of the parties.

Re The British Farmers' Pure Linseed Oil Cake Company (Limited), Nicholl's Case.

[47 L. J. R., Ch. (App.) 415; L. R., 7 Ch. Div. 533; affirmed, 48 L. J. R. (H. L.) 179; L. R., 3 App., Cas. 1005.]

The M. R.: The meaning of section 25 of the Companies Act, 1867, is that you are prohibited from contracting

that shares issued shall be paid for otherwise than in cash, except by a registered contract. When it says that the shares are to be "held" subject to the payment of the whole amount in cash, of course it means "originally held," because it is the "whole amount." The section in no way alters the law as to the evidence of payment for shares. An unregistered contract is no contract. The certificate of the company that shares are fully paid up is an absolute protection to a *bond fide* transferee from a liability to calls, notwithstanding that nothing has been paid on them, and no contract for their issue otherwise than subject to the payment of the whole amount has been registered.

**Chilton v. The Lord Mayor and Corporation of
London.**

[47 L. J. R., Ch. 433; L. R., 7 Ch. Div. 735. (Interlocutory hearing.)]

The right of pannage does not entitle its owner to restrain the grantor from lopping or cutting down his trees when it is proper to do so.

The right is one granted to the owner of pigs, or to the owner of land who keeps pigs, to go into the wood of the grantor and allow the pigs to eat the acorns or beech-mast which fall to the ground. None must be taken from the tree, either by the animals or by man for them; nor must the tree be shaken. Such rights were not unfrequently granted in old times. I never saw such a grant alone; but I have seen it connected with other rights of common. Monasteries used to make such grants to their tenants, sometimes by deed, and sometimes they were enjoyed by prescription or manorial custom. The plaintiff alleged a "right in the inhabitants of the parish of S. within the manor of L. during a certain period of the year to cut or lop under the name of lopwood the boughs and branches of the trees growing upon the waste lands of the forest (Epping) within the manor so as not to destroy or unnecessarily injure the trees, for the

proper use and consumption of such inhabitants as fuel." The defendant admitted the existence of the right "except as to spears" (a word undefined by them). Held, that such a right could not exist without a Crown grant, and that the Court would not presume a lost grant, and was not at liberty to assume the existence of an unproduced Act of Parliament necessary to give validity to a right claimed; and also that the admission by a defendant of a right which could not be supported in law did not entitle the plaintiff to judgment in respect of it.

Inhabitants of a parish, as such, cannot claim a profit *à prendre* of this kind. *Willingale v. Maitland*, 36 L. J. R., Ch. 64; L. R., 3 Eq. 103, decided that a Crown grant to inhabitants of a parish to take certain profits *à prendre* out of a royal manor was valid, and that the effect of the act was to incorporate the inhabitants. The objection might have been taken that if this was so the corporation must sue as such. The case was only heard on demurrer, when the fictions in the pleadings were necessarily admitted for purposes of the decision. This plaintiff is only an individual corporator, and certainly cannot sue as such, for he cannot bind the inhabitants. Moreover, he does not seem to be an inhabitant in the sense of being a member of the corporation, as his house is said to have been illegally erected on land, subject to commonable rights.

Again, the admission contains the exception of "spears," and is not therefore absolute.

Grant v. Banque Franco-Egyptienne.

[47 L. J., Ch. App. 455.]

The rule on appeals to the House of Lords is to order the costs to be paid, the receiving solicitors personally undertaking to repay in case the decision is reversed. The fact that there are other proceedings pending in the same action under which costs might become payable to the party ordered to pay costs, makes no difference in this practice.

Walters v. Woodbridge.

[47 L. J. R., N. S., Ch. App. 516; L. R., 7 Ch. Div. 504.]

A trustee ought to be indemnified against the costs of any action brought against him by a stranger in relation to the trust estate, such action being one which the trustee must necessarily defend for the benefit of the trust estate. As the substance of the matter which is here in question was an attack upon a transaction in which the trustee was engaged simply because he was a trustee, and in relation to the trusts, it comes within the rule. It is true that the trustee was at the same time defending his character from the allegation against him of personal fraud—which allegation failed—but this was a mere incident of the defence. The fact of such charges having been made was sufficient ground for severing his defence from that of his co-trustees, and incurring a separate set of costs.

Dean v. McDowell.

[47 L. J. R., Ch. App. 537; L. R., 8 Ch. Div. 345.]

A partnership deed contained the usual clause that “neither partner shall engage in any other business except on account of and for the benefit of the partnership.” One of the partners secretly purchased a share in another business, not in rivalry with the partnership business, which was one of salt merchants and salt brokers, whilst that in which the share was purchased was that of salt manufacture.

Held, that the only remedy was by injunction to restrain the breach or for dissolution of the partnership and damages, which would be nominal only. There is no claim to an account of profits made in the other business.

This bill claimed such account. The mischiefs of breach are (1) Diverting the mind from the partnership business and (2) Making the partnership liable for losses in the second business, both remediable by injunction or dissolution. This is also a mere negative covenant, and there is no super-

added equity, there being no case in which such a claim has succeeded.

COMMENT.

The L.JJ. suggested that in order to give the right claimed the clause must be extended so as to enable the other partners to have the option of taking the share and profits in the other business or of leaving the partner acquiring it to bear the loss (if any) resulting therefrom. *Somerville v. Mackay*, 16 Ves. 382, was a case in which the defaulting partner had engaged in a business which was within the scope of the partnership. It was partnership business except for the wrongful attempts to withdraw it from the partnership contract, and to say that he was entitled to the profits for his own benefit. (L. J. Cotton.)

Burgoine v. Taylor.

[47 L. J. R., Ch. App. 542; L. R., 9 Ch. Div. 1.]

If from inadvertence a solicitor is not present when a cause is called on and judgment is given as by default, the cause will be restored on payment of the costs of the day.

Clements v. Norris.

[47 L. J., Ch. App. 546; L. R., 8 Ch. Div. 129.]

There is no implied authority to any one partner to take a house or lease for the purpose of carrying on a portion of the partnership business. The time for carrying on a business is not paramount to the place of carrying it on, or to the nature of the business. They are each matters of contract standing on an equal footing. If the partners cannot agree as to place, the contract, being indeterminate as to this, fails—the Court cannot decide as to place for them. The essence of the contract is mutuality of agreement. The co-partner objecting to the renewal of the lease on the old place is entitled to an injunction restraining the defendant partner from employing or pledging the credit of the partnership assets, in order to work under the new lease or in paying any liabilities which

accrued from the expiration of the old lease, on the 29th September, 1876. If the defendant thinks this will stop the partnership business, then of course the proper order will be for a general receiver.

The above rules apply to partnerships by deed (in the absence of other stipulations) and to those at will.

The Standard Bank of British South Africa v. Stokes.

[47 L. J., Ch. 554; L. R., 9 Ch. Div. 68.]

The rights and duties of adjoining owners who are within the Metropolitan Buildings Act, 1855 (18 & 19 Vict. c. 122), are settled thereby by way of substitution for those at common law. The plaintiffs and defendant were adjoining owners, and there was a party wall between their respective premises. The defendant gave notice under the 85th section of the above Act of his intention to raise the party wall and do other works. The section provides that unless assent is expressed within fourteen days dissent is to be implied. The plaintiffs never assented, although correspondence passed, and each party appointed a surveyor (sect. 7). That section provides for a settlement of the matter by either one surveyor agreed on between the parties, or by two surveyors appointed (one by each), or by a third surveyor appointed by the two first appointed. Held that in the absence of assent a difference had arisen and that the defendants could not proceed without appointment of surveyors, and their award.

The word "raise" in sub-sect. 67 of sect. 82 applies to raising a wall by under-pinning it.

In the absence of evidence as to ownership of a party wall a jury is entitled to find that it is owned by the adjoining proprietors as tenants in common.

At common law there is no action by one tenant in common against another for pulling down a party wall with a view to prompt building of another, or repairing it, or for

replacing an old foundation by a new one, even without notice to the co-tenant.

COMMENT.

But neither tenant in common must substantially alter the nature of the wall or do any act amounting to a claim of exclusive property in it. That would be evidence of ouster or destructive waste. Thus, a chimney or other structure cannot be placed on the top, for the other has a right to use the top of the wall in its former state. *Stedman v. Smith*, 8 E. & B. 1; 26 L. J., Q. B. 314.

Freeman v. Cox.

[47 L. J., Ch. 560; L. R., 8 Ch. Div. 148.]

"The Court does not, upon motion, order money to be brought into Court upon any evidence which may satisfy the judge of the fact, but it proceeds alone upon the admissions of the defendant." (Lord Langdale in *Boschetti v. Power*, 14 L. J., Ch. 175; 8 Beav. 180.) But I will extend this principle to this case, an administration action, where the defendant executor of the will, has been served with notice of motion for payment into Court of two sums of 224*l.* cash and the proceeds of sale of 1,328*l.* consols, the defendant not appearing on the notice, and where the plaintiff (his joint executor) has sworn an uncontradicted affidavit tracing the moneys to the defendant, and showing that he could not have applied much to the purposes of the estate. I make the order for payment into Court although no accounts have yet been taken nor has any judgment been given.

COMMENT.

See also *The London Syndicate v. Lord* (App.), 48 L. J., Ch. 57; L. R., 8 Ch. Div. 84, establishing that if, as the result of accounts taken under a decree in a partnership suit they will show a balance of a certain sum at least, that sum will be ordered to be paid into Court without waiting for the chief clerk's certificate. See also *Hetherington v. Longrigg*, 48 L. J., Ch. 171; L. R., 10 Ch. Div. 162.

The Att.-Gen. v. The Duke of Northumberland.

[47 L. J., Ch. App. 569; L. R., 7 Ch. Div. 745.]

The M. R. : The gift in the will is "for the relief and use of the poorest of my kindred, such as are not able to work for their living—namely, sick, aged, and impotent persons, and such as cannot maintain their own charge." "Poorest" here evidently means "*very poor*." The testator means sick, aged, and impotent in such a way as to incapacitate them from earning their living: he does not mean a man who has 10,000*l.* a-year who happens to be sick, aged, or impotent. It does not mean poorest in the sense of the least wealthy of a number of wealthy persons. It means actually poor, and the word "poorest" adds intensity to the poverty pointed at. The dictum of V.-C. Wickens in *Gillam v. Taylor*, 42 L. J., Ch. 674; L. R., 16 Eq. 581 (but for which the M. R. thought that the case would not have come before them), is entirely incorrect when laying down the contrary.

Former schemes directing an application of the whole income, but not containing any declaration of right, may be varied by the Court from time to time.

**In re The Vron Colliery Co.**

[L. R., 20 Ch. Div. 442; 51 L. J., Ch. App. 389; and *In re Withernsea Brick Works (Limited)*, L. R., 16 Ch. Div., 337; 50 L. J., Ch. App., (L.J.J. James, Cotton and Lush).]

The result of the cases is—

- (1.) That the 10th sect. of the Judicature Act only substitutes for the old administration rule the bankruptcy rule that a secured creditor against a company must realize his security and prove for the balance. That it does not introduce any other bankruptcy rules, and that, therefore, seizure under a *fi. fa.* against a company before petition to wind up makes the judgment creditor a "secured creditor."

- (2.) That under the 85th, 87th, and 163rd sects. of the Companies' Act, 1862, the Court has a discretion to prevent an execution creditor from proceeding on his execution after the petition, and the object of the Act herein being collection and distribution of the assets of the company equally amongst the creditors, will almost always so restrain the execution creditor. In the last-named case the M. R. and L. J. Holker in effect disapproved *In re The London Cotton Co.* (35 L. J., Ch. 425; L. R., 2 Eq. 53), *In re Bastow & Co.* (36 L. J., Ch. 899; L. R., 4 Eq. 681), *In re The Rail. Steel and Plant Co., Ex parte Taylor* (47 L. J. R., Ch. 321; L. R., 8 Ch. Div. 183), and *In re Richards & Co.* (48 L. J., Ch. 555; L. R., 11 Ch. Div. 676).

COMMENT.

The principles of the cases so questioned are (1) that the mere act of giving indulgence at the request of a company is ground for preferring the creditor who gave it, and (2) that another ground is false pretence on the part of the company's officers inducing the indulgence. The M. R. suggested that perhaps the directors or officers making the false statement might be personally liable.



Beddow v. Beddow.

[47 L. J., Ch. 588; L. R., 9 Ch. Div. 89.]

In this case the M. R. granted an injunction to restrain an arbitrator who had misappropriated funds which were the subject of the arbitration, and had become indebted to one of the parties from continuing to act.

(See also *The Malmesbury Rail. Co. v. Budd* (45 L. J., Ch. 271, *ante*.)

The M. R. made the following observations as to the jurisdiction to grant injunctions :—

The jurisdiction of the Court of Chancery to grant injunctions was limited by the practice of successive chancellors, and was never extended beyond the warrant of authorities. It was not so now. One of the most useful functions of a court of justice is to restrain wrongful acts. The 79th, 81st, and 82nd sects. of the C. L. P. A. give the power upon such terms "as to the Court or Judge shall seem reasonable and just." No doubt the Court of Chancery was not limited by any other terms; but it was so limited by its own decisions that in certain cases injunctions ought not to be granted. When we come to the Judicature Act we find—(1) All jurisdiction possessed by either the Common Law or Chancery Courts transferred to the new High Court; (2) All Acts of Parliament apply to the new Court, including, therefore, the powers under the C. L. P. A. Consequently, the High Court has jurisdiction to grant injunctions whenever it may seem just to do so. This is the explanation of the 25th section, sub-sect. 8 of the Judicature Act: "An injunction may be granted . . . in all cases in which it shall appear to the Court to be just and convenient." In my opinion I have unlimited power to grant an injunction in any case in which it would be right or just to do so, according to settled legal reasons. For instance, I think (contrary to what, according to a newspaper report, J. Fry thinks) that the Court can restrain a newspaper from publishing a libel.

COMMENTS.

See now *The North London Rail. Co. v. The Great Northern Rail. Co.*, 52 L. J., Ch. App. 380; 47 L. T. 383, where the L.JJ. (Brett and Cotton) pointed out that, in their opinions, the Judicature Act did *not*, in effect, increase the jurisdiction to issue injunctions. The rule was, before the Act, and still is, that no Court issues an injunction, unless, if the thing goes on, there will be legal injury. The L.J. Brett said "it was not necessary" to decide whether the Judicature Act gave increased power. He thought not. The Act was one to regulate procedure only, and had not given to any Court a jurisdiction which it had not before. No case had gone beyond the "settled legal principle" on which

injunctions should be granted, whether decisions of Jessel, M. R., or otherwise, unless his decision in *Aslatt v. The Mayor, &c., of Southampton* (50 L. J., Ch. 31; L. R., 16 Ch. Div. 143) did so. Cotton, L. J., explained the language of the M. R. to mean that if there is either a legal or equitable right (independently of the Judicature Act) which is being interfered with, or which the Court is called on to protect, then, whenever the circumstances render it convenient and advisable to do so, the Court may protect that right by giving the remedy which previously would not have been given—viz., a remedy by injunction. The M. R.'s judgment in *Hedley v. Bates* (49 L. J., Ch. 170; L. R., 13 Ch. Div. 498, 501), *Aslatt v. The Mayor, &c., of Southampton* (*supra*); and in *Stannard v. The Vestry of St. Giles, Camberwell* (51 L. J., Ch. 629; L. R., 20 Ch. Div. 190), are here fully discussed.

The arbitration sought to be enjoined in the case before the L.JJ. was admittedly a futile one; but, if so, the objecting party concerned might have remained away from the arbitration proceedings, and so there was no legal injury arising to him from its continuance. At the same time does not the "justice and convenience" of the case require that a party should be protected from vexatious and futile proceedings? Is it quite correct to say that the Judicature Act was *only* to regulate procedure? There are very numerous provisions in it which alter the position of parties—*e. g.*, the substitution in winding-up proceedings of bankruptcy rules; the rules of equity are to prevail where they conflict with those at law, and there are provisions of various kinds in sect. 25 affecting principles of law and the position of parties.

Moreover, sub-sect. 7 of sect. 24 is very wide: all relief in respect of any legal or equitable claim which "to the Court shall seem just," is to be granted; "so that . . . all matters . . . in controversy . . . may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided."

"*Boni judicis est ampliare jurisdictionem.*"

Cannon v. Villars.

[47 L. J., Ch. 597; L. R., 8 Ch. Div. 415.]

The M. R.: The only access to the piece of ground in question (which was let for the erection of a workshop) by which any vehicle could approach the workshop was through a paved gateway, the entrance to a long yard. The only

other access at all is a door through which carts could not pass. The landlord owned both the yard, the land, and the gateway. When the agreement for the lease to the plaintiff was entered into, the landlord had some stables in the yard, and he used vans in his business, which on working days went in and out of the gateway. A grant of a *right of way, simpliciter*, may be of a limited or general right, *which* it is a question of construction of the grant that depends on the circumstances attending its execution. If a right of way is granted over a metalled road with a pavement on both sides, then existing, the presumption is that the grant was for the *general* right, foot or carriage way. *Primâ facie* the grant has regard to the nature of the road over which it is granted, and the purpose for which it is to be used.

Mayer v. Murray.

[47 L. J., Ch. 605 ; L. R., 8 Ch. Div. 424.]

Although wilful default against a mortgagee in possession, who has sold and received proceeds, has neither been alleged nor proved, yet the judgment rightly directs "an account of the proceeds of sale which the mortgagee has, or but for his wilful default, might have received."

In re **Hall v. Barker.**

[47 L. J., Ch. 621 ; L. R., 9 Ch. Div. 538.]

In this case it was sought to be established that a solicitor who undertakes a complicated suit, such as one for administration of an estate, has not a cause of action until the business is brought to a conclusion, or until he discharges himself after notice.

The M. R.: This does not seem to me a reasonable doctrine. It has been decided to apply to common law actions.

But the notion of entirety of contract is not applicable to such a case as this. It is a series of services, nominally in relation to one matter, but in reality in relation to several matters. There must be a break somewhere: for instance, a fair break might be the obtaining an interlocutory order for accounts. If this were not so there would be an indefinite postponement of the right to remuneration. One suit may give rise to twenty others.

***Re* Dudson's Contract of Sale to Kinsella.**

[47 L. J., Ch. (App.) 632; L. R., 8 Ch. Div. 628 (affirming the M. R.).]

It was the settled practice that the beneficial owner of the first equitable estate for life was the proper person to be made tenant to the *præcipe* in a common recovery; and where there is an equitable estate limited to trustees for a married woman for her separate use for life, with remainders over, the lady to whom the separate use for life is given is the owner of the prior estate of freehold and protector of the settlement within sect. 22 of the Fines and Recoveries Act.

***In re* Mason (deceased), *Mason v. Robinson*.**

[47 L. J. R., Ch. 660; L. R., 8 Ch. Div. 411.]

Where there is a simple gift of an annuity with a direction to set apart a fund out of which the annuity is to be paid and kept down, and followed by a gift of general residue to another, such direction does not cut down the right of the annuitant to have the deficiency made good out of the corpus. The first class of cases, of which *Baker v. Baker* (27 L. J., Ch. 417; 6 H. L. C. 616) is an instance is that in which the testator has not given an annuity at all, but has directed a sum to be set apart which, at the time of such setting apart, shall be sufficient to produce an annual amount,

which is to be invested in certain securities; and then proceeds to direct the income of the fund so set apart to be paid to some person. That is not an annuity at all; what is given is the income of a fund set apart, and nothing more.

The second class of cases is that represented by *Booth v. Coulton* (39 L. J., Ch. 622; L. R., 5 Ch. Div. 684), where there is no independent gift of an annuity, but where a fund is directed to be invested, or an existing investment or estate producing income is given, and the testator directs out of the income of the fund so invested, or out of the rents and profits of the existing investment or estate, an annuity to be paid; and, subject thereto, the fund and its income or the estate and its rents go elsewhere. There it is held that, though there is a gift of an annuity out of income, while in the case of deficiency the annuitant can never go beyond the income, yet no one else can take under the gift over until satisfaction of the annuity, and so, even after the death of the annuitant, the income is to be appropriated to discharge the arrears until the annuity has been completely satisfied.

If I am not right in my view that the independent gift of an annuity in the first instance here distinguishes this from either of these classes, I think it falls within the latter class, for the words of the residuary gift here are undistinguishable from those in *Booth v. Coulton*.



Re Stubbs—Hanson v. Stubbs.

[47 L. J., Ch. 671; L. R., 8 Ch. Div. 54.]

A creditor who obtains judgment against an executor before an administration decree, obtains a preference over other creditors notwithstanding the 32 & 33 Vict. c. 46. (*In re Williams*, 42 L. J., Ch. 158; L. R., 15 Eq. 270, V.-C. Wickens, followed.)

But the judgment must be actually signed, and if delayed under order *nisi* for judgment, unless amount be paid within

five days, and a decree for administration intervenes, the priority is lost.

In re The Church and Empire Fire Insurance Company, Andress's Case.

[47 L. J., Ch. App. 679; L. R., 8 Ch. Div. 126; and *In re The Government Security Fire Insurance Co., White's Case* (App.), 48 L. J., Ch. 820; L. R., 12 Ch. Div. 511.]

The M. R. : There was an offer by the company to allot the shares and an acceptance by A, a printer—the bargain being to give him seventy-five paid-up shares for his services in printing advertisements of the company for three months. The shares were allotted, and he was entered as the holder of seventy-five paid-up shares. But sect. 25 says that this shall not take effect: the shares must be paid for in cash. The appellant had notice of all the facts, yet he took a certificate that the shares had been paid up. This would not support a plea of payment at law. [Thesiger, L. J. : To support such a plea there must either be an actual payment in cash, or an agreement to set off two liabilities to pay cash against each other.] The company never owed A. any money or bargained to pay him any. He accepted the shares and them only. [Per Thesiger, L. J. (*Nicholls's case*, 47 L. J. 415, M. R.).—Had no application, because there the certificates had got into the hands of an innocent transferee, and the principle was that the company had made a representation to such innocent person that the shares had been fully paid up, by which representation the company were estopped. It was not then open to the liquidator to deny payment. That principle has no application to a person who knows all the facts.]

Fisher v. Owen.

[47 L. J. R., Ch. App. 681; L. R., 8 Ch. Div. 645.]

As to interrogatories the answers to which may tend to criminate, the proper course is for the person interrogated to object to answer on the ground of privilege.

COMMENTS.

See also *Atherley v. Harvey*, 46 L. J. R., Q. B. 518; L. R., 2 Q. B. Div. 524.

As to the right to discovery generally, and especially in actions of ejectment or for recovery of land, see *Lyell v. Kennedy* (H.L.), 52 L. J., Ch. 385. In that case the matters on which the discovery was sought by the plaintiff were all relevant to the plaintiff's case and not to the defendants. The House of Lords laid down that the right of discovery was the same in an action in the nature of ejectment as in all cases. It was supposed that the plaintiff must succeed on the strength of his own title unassisted by disclosures from a defendant. But bills of discovery in aid of a plaintiff at law in ejectment were common in Chancery. "Unless the whole matters inquired into by the interrogatories which the defendant has not answered are 'irrelevant to the plaintiff's case about to come on for trial,' the defendant must make some sufficient answer."

**Samuel v. Samuel.**

[47 L. J. R., Ch. 716; L. R., 12 Ch. Div. 152.]

The manifest general intent in clauses of forfeiture on bankruptcy, or alienation to others by mortgage or otherwise, &c., is that there shall be personal enjoyment of the bequest. If a man, whose bequest is subject to such a clause, makes a mortgage "subject to the proviso or condition in the words of the will," he merely means, "I charge if I *can*, otherwise I do not." So such a charge would be a futility, and would not work a forfeiture.

In *Re Parnham's Trusts* (*ante*) I said I doubted the decision in *White v. Chitty*, 35 L. J. 343; L. R., 1 Eq. 372. I did not mean that I doubted the principle of that case, but that I thought it ought not to be extended to an annulment after the death of the tenant for life, and doubted whether the

actual receipt of income should have made any difference. A minute point is whether the vacation of the charge or destruction of the incumbrance made in defiance of such a clause ought to take place before the period of distribution, or only before first actual payment. I think it ought to take place before the period of distribution.

Trowell v. Shenton.

[47 L. J. R., Ch. App. 738; L. R., 8 Ch. Div. 318.]

The M. R. : Before marriage a minor wrote to his intended wife a letter which, for the purpose of the judgment, I assume to be a sufficient agreement as to its terms, to settle certain property on the wife. He did not marry until after he attained twenty-one. After marriage a settlement was made : it comprised other property besides that mentioned in the prior agreement, and the limitations were not the same as those there mentioned. It contained no express reference, by recital or otherwise, to the agreement. It was argued that the ratification after twenty-one of a contract for value made while an infant gave vitality to the contract *ab initio*. But the ratification must, under Lord Tenterden's Act (9 Geo. 4, c. 14, sect. 5), be in writing. In order that there should be a ratification, you must be able to gather from the terms of the writing itself, or by necessary implication, that the prior agreement was ratified. Here there is nothing of the kind. The settlement is, therefore, voluntary. "It is not enough merely to say in writing that there was a previous parol agreement : it must be proved that there was such an agreement, and to let in such proof is precisely what the statute meant to forbid." Lord Cranworth in *Warden v. Jones*, 27 L. J., Ch. 190; 2 De G. & J. 76. The marginal note in *Lavender v. Blackstone* (2 Lev. 146), is not now law. See *Doe v. Manning*, 9 East, 59. Such an agreement as this is impeachable and void under 27 Eliz. c. 4.

Brooks v. Wigg.

[47 L. J. R., Ch. App. 749 ; L. R., 8 Ch. Div. 510.]

Where parties have agreed that evidence shall be taken by affidavit, and numerous affidavits are filed, and the evidence closed, the judge ought, in his discretion, under Rule 26, Ord. 36, to direct the action to be tried before a judge without a jury.

Bonnewell v. Jenkins.

[47 L. J. R., Ch. App. 758 ; L. R., 8 Ch. Div. 70.]

The acceptance of an explicit offer of two leasehold houses for purchase in these terms:—"We are instructed to accept your offer of 800*l.* for these premises, and have asked Mr. J.'s solicitor to prepare contract," forms a binding contract.

COMMENTS.

This is well settled now by the decision above, and by that of the H. L. in *Hussey v. Payne*, *sup.* See also *Lewis v. Brass* (App.) L. R., 3 Q. B. Div. 667.

If an offer is made by letter, expressly or impliedly, authorizing its acceptance by post, and a letter accepting is duly addressed and posted, *Baggallay and Thesiger*, L.JJ., affirming the Court of Exchequer (48 L. J. R., Ex. 219), held that the contract was complete, notwithstanding the non-receipt of the acceptance at any time (*Bramwell*, L. J., *dis.*). (*The Household Fire, &c. Co. (Limited) v. Grant*, 48 L. J., Ex. 577 ; L. R., 4 Ex. Div. 216.) But if before acceptance the person to whom the offer is made is aware of the withdrawal of the offer, there is no binding contract by such acceptance, although no formal notice of withdrawal has been given. (*Dickinson v. Dodds*, 45 L. J., Ch. App. 777 ; L. R., 2 Ch. Div. 463, and *Byrne & Co. v. Tienhoven & Co.*, 49 L. J. R., C. P. 316 ; L. R., 4 Ch. Div. 344.) A withdrawal of an offer only takes effect from receipt of letter containing it, or notice (*ib.* ; and *Stevenson v. M'Lean*, 49 L. J. R., Q. B. Div. 701 ; L. R., 5 Q. B. Div. 346).

In re **Whitehouse and Company.**

[47 L. J. R., Ch. Div. 801; L. R., 9 Ch. Div. 595.]

The rule preventing contributories from setting off as against calls, debts due from them to the company, applies equally to voluntary and compulsory winding-up.

At common law there was no right of set-off. The statutes of Geo. 2 first established the right. Those statutes only apply to what were then common law actions and to mutual debts. Courts of Equity followed, and extended the analogy of the statutes,—certain cases were held within their equity. But equity would not allow a set-off, even at law, where there was an equity to prevent it, *i. e.*, where rights, although legally, were not equitably, mutual. The Bankruptcy Act clauses of set-off are rather wider than the general rights, so far as to individuals.

As regards companies, the final Act of 1862 was, in scheme, intended to provide that, in case of a winding-up, the assets of the company were to be collected by the liquidator and distributed among the creditors; but if the liquidator sued in his own name, of course he would not be indebted to the man to whom the company was indebted, and there would be no strict right of set-off. Therefore, if you want a set-off, you must show something in the Act giving it; there is no such right in principle. The debt due to the liquidator is distributable amongst the creditors, and the debt due to the individual from the company would only rank to obtain a dividend for the creditor for the amount due, the case of an insolvent company being very like bankruptcy. The two debts are not applicable to the same purpose, and could not properly be made the subject of set-off.

Sect. 38 creates new liabilities as affecting shareholders (*Webb v. Whiffn* (H. L.) 42 L. J., Ch. 161; L. R., 5 E. and I. App. 711). It applies to all kinds of winding-up. The call is not a debt to the company, but a liability to contribute to the assets of the company, to be enforced by the liqui-

dator. The 138th sect. shows that a liquidator may enforce these calls under voluntary winding-up.

The 101st is the only one dealing in terms with set-offs. It gives certain powers to the Court to allow a set-off where the company is not limited. If there is any implication from the section it is that this is not to be done where the company is limited.

In *Grissell's case* (35 L. J. R., Ch. 752; L. R., 1 Ch. 528), Lord Chelmsford took no such distinction between a voluntary and a compulsory winding-up as was afterwards taken by the C. P. in *The Brighton Arcade Co. v. Dowling* (37 L. J. R., C. P. 125; L. R., 3 C. P. 175). Lord Romilly's decision in *Calisher's case* (37 L. J. R., Ch. 208; L. R., 5 Eq. 214) was the same as Lord Chelmsford's,—against the right of a contributory to set-off a debt against a call. He thought this could be done by “special agreement,” but was overruled as to this, it being decided by the Appellate Court that it could not be done even by special agreement. This decision was given a few days before that of the C. P. in the above case. There the Court thought the set-off might be allowed in a voluntary winding-up but not in a compulsory winding-up. But the attention of the Court was not drawn to the absurd consequence, viz., that under sect. 138 the voluntary liquidator could apply to the Court to enforce payment, which could exercise all the same powers as in a compulsory winding-up, and yet if he could not get the benefit of the Act, as regards payments by the contributory, in an action at law, the extraordinary result would be that he would get his demand minus the set-off in the action, and then come to the Court under sect. 138 for the balance allowed at common law by way of set-off. If the company is insolvent a voluntary winding-up is more probable. All the reasoning of the C. P. in the above case seems to me utterly fallacious. It was never contemplated that every case should be brought into Court on a question of set-off, as would be necessary if that decision stood.

Lord Selborne, in *Black & Co.'s case* (42 L. J. R., Ch. 404; L. R., 8 Ch. 254), overruling Lord Romilly's dictum that

there could be a set-off by special agreement, indicates his objections to the case in the C. P., and it must be considered overruled.

COMMENT.

The 10th section of the Judicature Act does not affect the above rule against set-off. (*In re The General Works Co. (Limited)*)—*Gill's case*, 48 L. J. R., Ch. 774; L. R., 12 Ch. Div. 755.)

Brigstocke v. Brigstocke (App.).

[47 L. J. R., Ch. 817; L. R., 8 Ch. Div. 537.]

The M. R.: The tenant for life of a settled estate takes all casual profits which accrue during the time of his tenancy for life. Thus the tenant for life of a manor takes the fines arising from copyholds. The tenant for life can admit to the copyhold because it is necessary to the existence of the custom. Where there are open mines the tenant for life receives the royalties on minerals, though these are really instalments of purchase-money of part of the inheritance. In most cases fines are merely a mode of securing rent of two kinds—(1) an annual rent; (2) a rent payable at more distant intervals. A fine is in the nature of a payment of rent beforehand, but a tenant for life is entitled to rent made payable beforehand as much as to any other rent.

**The Merchant Banking Co. of London (Limited) v.
The Merchants Joint Stock Bank.**

[47 L. J. R., Ch. 828; L. R., 9 Ch. Div. 560.]

Unless there be *mala fides* in the assumption by one person or company of the name of another person or company no injunction against the adoption of such name will be granted.

Sect. 20 of the Companies Act, 1862, has no application to a case of the kind where there has been registration of the second company in a name somewhat like the other.

As an example of circumstances under which I should assume *mala fides* and grant an injunction, I will put the case of a man called Coutts taking a house in the Strand and putting up over his door "Coutts & Co." I should restrain him from such act.

[See *The Guardian Fire and Life Assurance Co. v. The Guardian and General Insurance Co. (Limited)*, *post*.]

The Anglo-Italian Bank v. Davies.

[47 L. J. R., Ch. App. 833; L. R., 9 Ch. Div. 275.]

The M. R.: My order in *Tillett v. Pearson* (43 L. J. R., Ch. 93) was a delivery in execution because the sheriff had been excluded. It was an equitable execution, and the judgment can only be supported on the above ground.

There is an unsatisfied, undisputed judgment against the defendant for many thousands of pounds. The defendant is in possession of freehold land in fee simple, of which he is receiving the rents. The land is subject to a mortgage, and, the legal estate being in the mortgagee, the judgment creditor cannot obtain possession of it under the ordinary *elegit*. The argument against giving the plaintiff relief is founded upon the fact that the words of the statute 27 & 28 Vict. c. 112, do not fit in with the preamble or with the ordinary judgment law. What was the meaning of "actually delivered in execution"? It was decided that it meant "delivered in execution." The words "other lawful authority" referred to the order of a Court having authority to give that which amounted to delivery in execution—equitable execution, or putting the land in the possession of a receiver. (*Hatton v. Haywood*, 43 L. J., Ch. App. 372; L. R., 9 Ch. App. 229.)

The execution is to be obtained upon interlocutory application, on which a receiver will be appointed. The origin of the right is that the judgment creditor has no interest in the estate itself; he only has the potentiality of acquiring one.

The Judicature Act (sect. 25, sub-sect. 8) has enlarged the powers of granting injunctions and receivers, and they may be granted after judgment as well as before it.

Then comes the question how is it to be exercised? By motion in the action itself? or is it necessary to institute a new action? Here the plaintiff has brought a separate action, claiming a declaration that he has a charge and the appointment of a receiver. Therefore it is not necessary to decide that, but I should prefer the shorter and cheaper process of motion in the action itself.

COMMENT.

Brett and Cotton, L.JJ. were sitting with the M. R. on the above appeal. They refrained from expressing opinions as to the effect of the Judicature Act, and, in *The North London Rail. Co. v. The Great Northern Rail. Co.*, 52 L. J., Ch. App. 380, expressed some dissent. See comment on *Beddow v. Beddow*, ante. Upon the subject of the above case, see also *In re Watkins, Ex parte Evans*, 49 L. J., Bank. App. 7; L. R., 13 Ch. Div. 257. There was an interim order in that case for the appointment of a receiver. Before it was made absolute the debtor filed a petition for liquidation under the Bankruptcy Act. It was held that it was idle to go through the form of issuing an *elegit* where it is known that the writ can have no result, and that the order interim had the effect of equitable execution and made the judgment creditor a "secured creditor" under the bankruptcy law. The application is properly made an interlocutory application.

Bulley v. Bulley.

[47 L. J. R., Ch. App. 841; L. R., 8 Ch. Div. 47.]

The M. R.: I am not prepared to assent to the narrow proposition that the property on which a solicitor can have a charge must be the property of his client. At any rate, here the property was in one sense that of the trustee, as trustee, and in another sense it was his property, he being the proper person to defend it in this suit. His solicitor is entitled to a charge on the property.

In re Birkett's Trusts.

[47 L. J. R., Ch. 846 ; L. R., 9 Ch. Div. 576.]

If there were no authorities I should hold that where there is a gift of money in trust to apply a portion of the income for a definite purpose, and a gift of the surplus for another purpose (the first purpose being sufficiently defined to ascertain the amount), if the trust in favour of the first purpose fails, the gift of the surplus is unaffected beyond the amount so ascertained. If, for instance, a man gave an income of 10,000*l.* a year in trust in the first place to keep his father's tombstone in repair, which could not exceed (say) 20*l.* a year, and the residue of the income was to go to charity, I should assume that good law and common sense would concur in saying that the 20*l.* gift was void, and that the 9,980*l.* were well given to charity. I should say that a gift for repair of a tombstone, especially if already existing, is sufficiently definite for ascertainment. *Chapman v. Brown*, 6 Ves. 404, does not appear to me to be overruled by *The Magistrates of Dundee v. Morris*, 3 Macq. 134: because in one case the amount for the first object could be ascertained, and in the other Sir Wm. Grant thought it could not. "A chapel for the service of Almighty God" might be a mere barn-like structure, or a chapel like the Sainte Chapelle in Paris or the Sistine at Rome. But Judges of first instance must not disregard a series of decisions by other Judges of first instance. In 1867, V.-C. Wood decided in *Fisk v. The Attorney-General*, L. R., 4 Eq. 521, that when there was a gift to a named person of a sum of money, upon trust out of the dividends to apply such part thereof as should be required to keep in repair a family grave and apply the surplus income in charity; then, although the gift for the grave failed, yet the prior gift was not affected, and the whole income was applicable to the charity. It may be difficult on principle to discover how the conclusion was arrived at, but it was followed twice by V.-C. Bacon, in *Hunter v. Bullock*, 41 L. J., Ch. 637; L. R., 14 Eq. 45, and in *Dawson v. Small*, 43 L. J., Ch. 406;

L. R., 18 Eq. 114; and by V.-C. Malins, in *In re Williams*, 47 L. J., Ch. 92; L. R., 5 Ch. Div. 735. I must, as a judge of first instance, follow these decisions.

COMMENT.

Apparently, if the M. R. had been exercising appellate jurisdiction, he would have overruled these decisions.

Tussaud v. Tussaud.

[47 L. J. R., Ch. App. 849; L. R., 9 Ch. Div. 363 (reversing the M. R.).]

Parol evidence is admissible to rebut an equity arising from a presumption (such as that against double portions), but not to raise such an equity. You can admit evidence by parol to show that one of two instruments is not intended to operate inconsistently with its *prima facie* effect. The evidence in question was that of declarations of the testator, and it was admitted.

The presumption against double portions is "founded on the assumption that in making the second instrument the maker of it supposes himself to be substantially satisfying obligations of the first"—*Chichester v. Coventry*, 36 L. J., Ch. App. 673; L. R., 2 E. & I. App. 71 (Lord Cranworth). We do not think the parol evidence here aids the contention that there was no satisfaction of the covenant by the will. But the gifts are of such varying nature, and the persons interested under the will do not include all who were interested under the settlement. We therefore decide that the gift by will is no satisfaction.

There are very few cases where a gift by will has been held to satisfy a gift to the donee, *with others*, by previous document.

Attree v. Hawe.

[47 L. J. R., Ch. App. 863; L. R., 9 Ch. Div. 337.]

The M. R. joined in this decision that railway debenture stock created under the Companies Clauses Act, 1863 (26 &

27 Vict. c. 118), was not an interest in land within the 3rd sect. of the Charitable Uses Act, 9 Geo. 2, c. 36.

COMMENTS.

Other recent decisions are *Cluff v. Cluff*, 45 L. J., Ch. 20; L. R., 2 Ch. Div. 222, holding that consolidated stock of the Metropolitan Board of Works cannot be validly bequeathed because amounting to an interest in land; that bonds charged under 3 & 4 Vict. c. 88, on police rates, *can* be so bequeathed, as also can debentures of an ordinary waterworks company (*In re Harris Jacson v. Governors of Queen Anne's Bounty*, 49 L. J., Ch. 687; L. R., 15 Ch. Div. 561; *Holdsworth v. Davenport*, 46 L. J., Ch. 20; L. R., 3 Ch. Div. 185. But debentures of a corporation charged upon their lands cannot be devised to charities unless the mortgagee is not intended to take the actual land (*Chandler v. Howell*, 46 L. J., Ch. 25; L. R., 4 Ch. Div. 651).

In re The Wincham Shipbuilding & Boiler Company, Hallmark's Case.

[47 L. J. R., Ch. App. 868; L. R., 9 Ch. Div. 329.]

The M. R.—This is a most exceptional case, because directors are generally bound to take a certain number of shares; but here, the company having been registered without articles of association, is subject to Table A. of the Companies Act, 1862, under which no share qualification for a director is necessary. The respondent swears that he never applied for any shares nor received any letter of allotment, and did not know that his name was on the register until after the commencement of the winding-up. It is urged that the mere fact of becoming a director infers a contract to take shares, and binds with knowledge of all the books and their contents, including the entry on the register of holding the shares (fifty) said to have been allotted to the respondent. I cannot so hold. *Wheatcroft's case* (42 L. J. R., Ch. 853) disapproved, as also *obiter dictum* of Lord Romilly in *Ex parte Brown*, *In re Newcastle Marine Insurance Co.*, 19 Beav. 97.

In re Lister, Ex parte Pike.

[47 L. J. R., Bank. App. 100; L. R., 8 Ch. Div. 754.]

A promissory note for money advanced to pay racing debts is not founded on an illegal consideration within 5 & 6 Will. 4, c. 41.

The M. R. : The Act means to prohibit recovery of money lent for the illegal purpose of gaming or betting—money lent by one to another around a gaming-table to game with, or money lent to bet, is within the Act. The object was to deter from committing the illegal act. Here the mischief was done; the bet was lost before the advance of the money. *Alcinbrook v. Hall*, 2 Wils. 309, is in point, although it is a strict construction of the Act, which is, however, penal. We shall not overrule it.

COMMENT.

In *McKinnel v. Robinson*, 3 Mee. & W. 434; 7 L. J., Exch. 149, a doubt as to the last-named case is suggested.

*In re Newmarch—Newmarch v. Storr.*

[48 L. J. R., Ch. App. 28; L. R., 9 Ch. Div. 12.]

A testator devised one specified freehold estate to his daughter for life, with remainder to her children as tenants in common, and then devised all other his real estate, “charged nevertheless in aid of his personal estate and in exoneration of his other real estate, with the payment of all his just debts,” upon trusts for his three sons. *All* the real estate so devised as above was included in one mortgage for 1,000*l*.

The M. R. : Locke King’s Act applies where the question is one of contribution between two or more devisees of an entire mortgaged estate. The Amending Act of 1867 is a polite method of getting over *Moore v. Moore* (32 L. J., Ch. 605; 1 De G., J. & S. 602), and *Eno v. Tatham* (32 L. J., Ch. 159; 3 De G., J. & S. 443). This Act only refers to

a general direction to pay debts out of personalty, because there had been a decision of the Court on that point. It is not possible to hold consistently that a general direction to pay debts out of personalty does not evince a contrary intention, and that a general direction to pay them out of realty, or out of mixed realty and personalty, does evince a contrary intention. The reasoning that the word "debt" would include a mortgage debt, and that therefore a direction to pay debts includes a mortgage debt, is destroyed by the 1867 Act, which, in effect, says the word "debts" shall *not* include mortgage debts unless there are express words showing an intention to the contrary.

It is therefore impossible to hold that a charge of "my just debts," when used with reference to a mixed fund of realty and personalty, or with reference to real estate alone, amounts to a contrary intention within the Act. Then are there other words? The clause is "charged, in aid of my personal estate and in exoneration of my other real estate, with the payment of all my just debts." The true construction, I think, is that the words "in aid of my personal estate" must mean that the real estate is to assist the personal estate in that to which it is primarily liable; and the answer to that is that the charge of debts on the personalty is within the Act of 1867, and therefore does not include the mortgage debt. To hold otherwise would be illogical, for then the personal estate must be taken to be charged with the mortgage debt, which is contrary to the Act.

Gething v. Keighley.

[48 L. J. R., Ch. 45; L. R., 9 Ch. Div. 547.]

Where a single item in a settled account is of a *fraudulent* nature the account is opened altogether; where this is not so the proper order is to give liberty to surcharge and falsify. The person alleging the errors must clearly prove them, the onus being on him.

***Re Wincham Shipbuilding, &c., Company,
Poole & Company's case.***

[48 L. J. R., 1 Ch. App. 48 ; L. R., 9 Ch. Div. 322.]

The M. R. : Directors are trustees for the shareholders, but not for creditors of the company. If directors give a personal guarantee for a debt due from the company, and then pay up amounts due from them on shares and apply the amount so paid up in reduction of such debt, there is nothing impeachable in the transaction unless it amounts to a fraudulent preference within sect. 61 of the Companies Act, 1862. Here there is no question as to that, for the creditors who were paid had sued and recovered judgment. Though the directors secured a collateral benefit to themselves, the company, their cestui que trusts, were not injured. The creditors are injured, for they will get a smaller dividend. But the company are insolvent.

COMMENT.

Even if the case had been between individuals there would appear to be no remedy short of the establishment of the relationship of trustee and cestui que trust, unless the fraudulent preference could be established.

Re Michell's Trusts.

[48 L. J. R., Ch. 50 ; L. R., 9 Ch. Div. 5.]

Where the words of a covenant are ambiguous you may resort to the recital. After reciting an agreement to settle certain property therein described, it says it was agreed that on the said intended marriage "the said H. [intended husband] shall enter into the covenant for settling upon the same trusts any future property to which the said M. [intended wife] may become entitled after the solemnization of the said intended marriage." The recital, therefore, clearly contemplates a covenant to settle *future acquired* property. That is what "future" property means. The property here does not fulfil that description. The interest of the wife certainly became absolute instead of contingent; but it remained during

the coverture reversionary. There was outstanding a life interest, which did not determine until after the wife's death. The covenant is, "that in case at any time during the joint lives of him the said H., and M., his intended wife, any future portion or real or personal estate whatsoever (exceeding at one time in value 300*l.*) shall come to or devolve upon the said M., or upon the said H. in her right by or under the will of the said J. H. M., or by or under any other will, donation, or settlement, or by any person dying intestate, or otherwise howsoever, and whether in possession, reversion, remainder, contingency or expectancy, the said H., and all other necessary parties, will from time to time settle or concur with the said M. in all reasonable acts and deeds to settle" the same "as if the same future property were included and settled in and by these presents, and, being real estate, were directed to be converted into personal estate." That cannot be read literally. The husband could not, either with or without the wife, settle an "expectancy," *i. e.*, property they had not got. You must supply some words; it must mean, *that when he gets it he will settle it*. This property, being one-third of a residuary estate, he was not able to settle, either with or without his wife, during the coverture. This agrees with the recital, and with what one would suppose to be the meaning, that when the husband could obtain it he should not keep it but settle it.

Re The British Farmer's Pure Linseed Oil Cake Company (Limited), Potter & Brown's Case.

[48 L. J. R., Ch. App. 56.]

The 25th sect. of the Companies Act, 1862, intended to prevent fraud, has often been made the instrument of fraud —*i. e.*, it has allowed companies to make people pay again for shares for which a full consideration, although not in cash, has been given. Here the shares were issued for a consideration other than a cash payment, and the contract was not registered. The appellants admit that they had some know-

ledge of the nature of the contract, and that put them on inquiry; and they must be taken to have known that the shares were subject to the payment of the whole amount in cash, unless the contract was registered.

Pulbrook v. The Richmond Consolidated Mining Company (Limited).

[48 L. J. R., Ch. 65; L. R., 9 Ch. Div. 610.]

One of the articles of association of a company provided that "no person shall be eligible as a director unless he holds, as registered member, in his own right, capital of the nominal value of 500*l.* at least," and another that "a director is to vacate his office if at any time he holds less than the nominal amount of capital required as his qualification for election."

The plaintiff, P., stood upon the register as holder of 100 shares. In January, 1877, he had executed a transfer of his shares to one C., by way of mortgage. By agreement this was not registered.

P. was elected a director 23rd August, 1877. On the 18th January, 1878, the transfer was registered, and C.'s name inserted as the holder of the shares. The other directors thereupon refused to allow P. to sit as a director. P. took out a summons to restore his name on the register under sect. 35, and this was done by order of the Court, plaintiff undertaking not to question any interim acts of the directors. On the 25th June, 1878, the plaintiff again attended a board meeting, but the directors refused to allow him to sit. In an action for declaration of his rights and motion to restrain the company from excluding him, Held that he must succeed, the company not being entitled to inquire into the beneficial ownership of shares, but being bound by the register.

"Holder in his own right" meant that they must not be shares to which P. was entitled as a personal representative, husband of a female member, or as trustee in bankruptcy.

COMMENT.

A joint stock company has no inherent right to remove its directors. If there is power to alter articles, however, that can

first be validly done, and then the removal effected in accordance with power given by a so altered article. See *Blackpool v. Hampson*, L. R., 23 Ch. D. 1.

Rogers v. Mutch.

[48 L. J. R., Ch. 133; L. R., 10 Ch. Div. 25.]

E. H., by will dated 3rd June, 1873, bequeathed "the sum of 100*l.* to each of the children of my niece, E. M., who shall live to attain the age of twenty-one years." Testatrix died 31st October, 1873, leaving her niece, E. M., surviving her: E. M. was married, but had not then any children. Held that no child E. M. might have could take, the gift being confined on the rule in *Ringrose v. Bramham*, 2 Cox, 384, and *Mann v. Thompson*, Kay, 638, the ground of which is the extreme inconvenience of postponing the distribution of the estate until all the children who may be born are ascertained, and the cases in which children born after the testator's death, but before the period of distribution, are admitted, being those where the total amount of the gift is independent of the number of objects.

[The gift of a certain sum to *each* of a class of objects at a future period is confined to those living at the testator's death (Hawk. Const. Wills, p. 73)].

In re Thompson's Trusts.

[48 L. J. R., Ch. 135; L. R., 9 Ch. Div. 607.]

A testatrix devised and bequeathed her real and personal estate to trustees upon trust to convert and to pay one third part to "the heirs or next of kin" of J. L., deceased. At her death she only had personal estate.

The M. R.: The rational construction is that the gift is not alternative, but to one and the same class. Testatrix knew that J. L. was dead, and gave to a class, his "heirs or next of kin." The statutory next of kin may fairly be described as such a class. As regards personal estate, the word "heirs" is construed to mean these, and as both

descriptions were intended to apply to one and the same class, I hold the gift to be to the statutory next of kin.

◆

Smith v. Butcher.

[48 L. J. R., Ch. 136; L. R., 10 Ch. Div. 113.]

Will of R. B., thus: "The rest . . . of my property . . . I desire to be placed in the public funds and the interest arising therefrom to be equally divided amongst the children of my brothers and sisters during their lives, and on the decease of either of them his or her share of the property to go to his or her lawful heir or heirs."

The M. R.: "For the purpose of construing any word in any will . . . such word must receive its only and primary sense unless the Court is satisfied that the testator intended to use it in a secondary and less proper sense." V. C. Kindersley in *Low v. Smith*, 25 L. J. R., Ch. 503; 2 Jur., N. S. 344. That rule applies none the less because the word is a word of art. If I could *guess* I should guess that he meant *children* by "lawful heirs," but I must not. "Heir" means the person or persons who, separately or together, would take the fee simple of an intestate. There is nothing in the context to give a different meaning, except the mere fact that the property is personalty. That is not enough. (*De Beauvoir v. De Beauvoir*, 15 L. J. R., Ch. 305; 15 Sim. 163; 3 H. L. C. 524.

COMMENT.

This decision does not affect or overrule *Doody v. Higgins* (25 L. J. R., Ch. 733; 2 K. & J. 729), because here the question arose not as to a substitutional gift but as a gift to the heir as *persona designata*. Fry, J., in *Neilson v. Monro*, 27 W. R., 936, and *In re Stannard*, 52 L. J. R., Ch. 355 (Kay, J.) Consider also *Leach v. Jay* (*ante*), 46 L. J. R., Ch. 499; affirmed on appeal, 47 L. J. R., Ch. App. 876, where the technical effect was necessarily given to the use of the word "seised."

◆

In re The Florence Land and Public Works Company.

[48 L. J. R., Ch. App. 137; L. R., 10 Ch. Div. 530.]

The memorandum of association explains that this company was established (1) to buy a concession in Florence, (2) then

to execute works under that concession (one for building houses and making new streets), (3) to purchase, lease, or otherwise acquire other concessions in Italy. Then comes this: "To sell, lease, charge, mortgage or otherwise dispose of the lands, buildings, sites for buildings and works erected or executed or in process of completion by the company, on such terms as the company may think fit." Then "to borrow money and to issue transferable bonds to bearer or otherwise, debentures and mortgage debentures based on all or any of the assets, real or personal, of the company." When a man uses ten words where two would do I do not consider it a sound rule of construction (knowing conveyancing precedents) to necessarily attach a separate meaning to each word. Of course an argument is afforded by such a use of words, but it would be greater if the words were used by a non-professional man. The 87th article gives the directors a general managing power, and the 88th is: "In order to the management of the affairs and business of the company, the directors shall have power, at all times, in the name and on behalf of the company, to do the following things:" the 9th being, "they may let, mortgage, sell, transfer or otherwise dispose of, either absolutely or conditionally, and in such manner and upon such terms and conditions, in all respects, as they think fit, any of the property or securities of the company." The 12th is that they may borrow on behalf of the company, "by way of mortgage of the whole or any part of the property of the company, or by bonds, debentures, or mortgage debentures, or in such other manner as they deem best." Every bond, debenture or mortgage is to be under the common seal and capable of transfer (Art. 117).

The bonds and debentures are to be so framed that the holders shall be entitled "to be paid out of the securities upon which the same are respectively charged, and the moneys, property, and effects of the company the respective sums in such bonds or mortgage debentures mentioned." The securities intended are on the property of the company, and to be held irrespectively of dates of bonds, equally amongst them-

selves as regards the loan for which the debentures are given as security. It is meant that the bonds or debentures shall be securities on the property of the company as a going concern, subject to the powers of the directors to dispose of the company's property for purposes of its business in the ordinary manner. It was not intended to paralyze the company by the execution of these debentures. If default is made any holder can apply for a receiver, and stop the company from going on. The security is (1) a charge on the property of the company, (2) a *pro ratâ* charge as between the several holders of the debentures, (3) a charge subject to the powers of the directors to carry on the business and to sell, let, or mortgage until a creditor in some way interferes.

I, on reconsideration, agree with every word of my judgment in *Norton v. The Florence Land and Public Works Co.* as reported (L. R., 7 Ch. Div. 332), except the top line at p. 338, which should be read "themselves, their successors and assigns," instead of "estate, property and effects."

The other L.JJ. treated the present case as virtually an appeal from the last-mentioned case, which if considered as holding that the security was nothing but a money-bond, and did not create any charge, was in their view incorrect.

Dean v. Wilson.

[48 L. J. R., Ch. 148; L. R., 10 Ch. Div. 136.]

When a sale is directed by the Court, and the conduct is given to one party, no other party has a right to interfere without leave of the Court. An injunction to restrain any such attempted interference will be given.

The Attorney-General v. The Mayor of Brecon.

[48 L. J. R. Ch. 153; L. R., 10 Ch. Div. 204.]

The Municipal Corporation Acts were intended to restrict dealings with corporation funds. In substance, the corpora-

tion was thereby reduced from the position of *owner* to that of *trustee*. The 92nd and other sections of the main Act (5 & 6 Will. 4, c. 76) contain the defined restrictions. The objects of expenses must be those "necessary" for carrying the "*purposes of the Act* into execution." The word "necessary" has, of course, a relative meaning. The word "purposes" cannot be confined to "express" purposes, for otherwise they could not defend, out of the borough fund, their whole property or their very existence. Thus it would be absurd to say that the corporation should not defend an action of ejectment for their whole property, or a proceeding to invalidate their charter of incorporation, whether taken in a court of law or by bill in parliament. Acts threatening the existence of the corporation must be resisted at its expense. The legislature either impliedly gives, or reserves to the corporation their ordinary rights. So, if the duties and rights of government of the corporation are interfered with, their existence is, to that extent, interfered with, for the corporate powers make up their existence. When attacked a corporation should have the right to defend itself—to defend all its rights and privileges, and the incidents of its property.

Sect. 8 of The Municipal Corporations (Borough Funds) Act, 1872 (35 & 36 Vict. c. 91), much increases the responsibility of corporations who choose to act in opposing bills without the sanction of the ratepayers. It will be more difficult for them to show that the expenses ought to be allowed. But the 8th section expressly states that then existing powers are not to be "taken away or diminished." The powers as above are therefore not destroyed by this Act.

The case of *The Queen v. The Corporation of Sheffield* (40 L. J. R., Q. B. 247; L. R. 6 Q. B. 652) was decided on the ground that, in the opinion of the Court, the expenses incurred were "altogether beyond the scope of the municipal government."

COMMENT.

It has lately been decided (*Reg. v. White*, 47 J. P. p. 405) by Williams and Smith, JJ., that overseers of the poor have no power

to devote the poor rates to any purpose except under the authority of a statute, and, therefore, may not apply same to the cost of opposing a bill even if the vestry gave consent. They are at present decided not to be "trustees" of the poor rate.

Re The National Funds Assurance Company.

[48 L. J. R., Ch. 163; L. R., 10 Ch. Div. 118.]

I first consider this case independently of the authorities. Sect. 165 of the Company's Act, 1862, is, "When in the course of the winding-up of a company it appears that any past or present director has misapplied or become liable or accountable for any moneys of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of any liquidator, or of any creditor or contributory of the company, examine into the conduct of such director, and compel him to repay any moneys so misapplied or retained, or for which he has become liable or accountable."

Any one of the named persons may apply. Here the liquidator originally applied, and I think he rightly did so alone; but to avoid any question I have given leave to join a creditor. After *Webb v. Whiffin* (42 L. J. R., Ch. 161; L. R., 5 H. L. C. 711) it is plain that the winding-up order confers new rights, such as did not previously exist, and can only be enforced under the winding-up. So far as to the *form* of the application. The *substance* of the application is this:—A limited assurance company has capital subscribed which, according to the articles, is to be applied only as capital, viz., to pay debts and liabilities of the company. Interest can only be paid out of income, and not out of capital. There is no power to the directors to return the capital to shareholders by instalments of five per cent., *i. e.*, to return it as a whole in twenty years; but they did proceed so to return the capital, fortified by a resolution of shareholders, it is true. There was no income, there having been no profits of the business. Interest was so paid only to one sort of share-

holders, viz., to holders of share warrants for fully paid-up shares. If the directors had no power to do this thing it could not be authorized at the shareholders' meeting. The creditors have the right to have the capital kept for payment of their claims. The company trades upon the reputation of a limited company, with a paid-up capital to meet its liabilities. It is inconsistent with that representation that the company, having paid up its capital, should pay it back to its shareholders. The right of creditors is clear. It can be enforced either by one of them, or by the liquidator.

I think there has been misapplication and breach of trust, and that I ought to make the directors account. The liability of each director must be limited to those sums which he participated in paying, without prejudice to the right to enforce repayment from shareholders who received the illegal payments. [See *In Re The Exchange Banking Co., Limited* (51 L. J. R., Ch. 525, V.-C. B., and 52 L. J. R., Ch. 217) (and see *ante*, p. 59).]

Day v. Brownrigg.

[48 L. J. R., Ch. App. 173 ; L. R., 10 Ch. Div. 294.]

The M. R. : There is no right to the exclusive use of any name which may be affixed to a house or to land. An allegation of damage will not give a right. There must *always* be *injury* for which a remedy is given.

In Re Mutlow's Estate.

[48 L. J. R., Ch. 198 ; L. R., 10 Ch. Div. 131.]

Where the condition of a bond given by a railway company to a landowner, under sect. 85 of the Lands Clauses Consolidation Act, 1845, has not been performed, the Court will, on the petition of the landowner, presented either adversely to or with the consent of the company, pay out to him the amount deposited under the above section.

Leonino v. Leonino.

[48 L. J. R., Ch. 217; L. R., 10 Ch. Div. 460.]

There is here one loan and one security on various properties, viz., stocks and shares and freehold property. A man may, no doubt, by express declaration in his mortgage, make a mortgage of two properties, so as that, though the incumbrancer may go against either, yet if he or the owner for the time being of the equity of redemption shall have created two different titles to these properties, so that they should go to different persons, the property which was the primary security shall remain so as between the persons claiming under him.

It is generally a declaration between real and personal representatives as to how the debt shall be primarily borne, and it is sometimes a declaration between two estates. It must expressly state that one property shall be the primary security as between the persons entitled to the equity of redemption in that estate and the persons entitled to the equity of redemption in the other estate. You can have the same result by reference or implication.

Lipscomb v. Lipscomb, 38 L. J. R., Ch. (V.-C. Malins) 90; L. R., 7 Eq. 501, and *De Rochefort v. Dances*, 40 L. J. R., Ch. 625; L. R., 12 Eq. 540 (V.-C. Wickens), I question,—although both are decisions on mere questions of construction of the documents in question, and not on the general principle.

Sharp v. Lush.

[48 L. J. R., Ch. 231; L. R., 10 Ch. Div. 468.]

“Executorship expenses” means the same as “testamentary expenses,” and include the costs of an administration suit.

Parties having leave to attend must obtain a special order to have their expenses allowed in an administration suit.

In re Leadbitter and Harvey.

[48 L. J. R., Ch. App. 242; L. R., 10 Ch. Div. 388.]

The "party interested" under sect. 39 of the Solicitor's Act, 1843 (6 & 7 Vict. c. 73), means a party interested under a trust created by deed or will, or under an intestacy, and the trustee indicated must be "chargeable with the bill." The words do not include a trustee in bankruptcy. A bankrupt after his discharge is not a "party interested" within the section in respect of a payment made pending the bankruptcy. When the payment complained of was made, there was only a probability or possibility of a surplus. *Rochfort v. Battersby*, 2 H. L. C. 388, decides that a bankrupt, pending bankruptcy, is not entitled to file a bill or exercise the rights of a *cestui que trust*.

This having been a bill paid to the solicitor of a mortgagee, the trustee could not have been "chargeable" with it, for the mortgagee was entitled to retain the costs out of his security.

[Baggallay, L.J.: On the discharge of the bankrupt the property in the hands of the trustee reverts to the bankrupt, as the successor of the trustee.]

Finney v. Price.

[48 L. J. R., Ch. 247; L. R., 10 Ch. Div. 13.]

J. B., by his will, gave to his wife "all her own wearing apparel, trinkets, and jewellery, and also all my household furniture, plate, linen, and china, articles, and things, except stock-in-trade, money, securities for money, books of account and manuscripts, and also all my household consumable stores that may be within my dwelling-house at the time of my decease, for her own absolute use and benefit." All the rest and residue of his real and personal estate and effects he devised and bequeathed to trustees on trust to sell and convert.

Held, that the tenant's fixtures in the testator's leasehold dwelling-house passed to the trustees with the house in which they were. Generally speaking, a bequest of a leasehold house to A., and of the household furniture in it to B., would not give B. the tenant's fixtures (*Paton v. Sheppard*, 10 Sim. 186, not approved).

Mulliner v. The Midland Railway Company.

[48 L. J. R., Ch. 258; L. R., 11 Ch. Div. 611.]

A railway company has no implied power to alienate, either for value or without value, any portion of the land actually used for the railway or works.

The railway company is empowered to make the "railway and works." The land purchased must be used for the general purposes of a railway, which is a public thoroughfare subject to special rights of the railway company. It is a property devoted to public as well as private purposes. The Act only enables the company to dispose of land for the purposes of the Act. Neither a gratuitous disposition, nor a sale of the railway, could be a purpose of the Act. The provision in the 20th section is that the company may "take and use," not take and sell, defined lands. And by sect. 19 they have power to take ten acres for extraordinary purposes.

The 127th sect. of the Lands Consolidation Clauses Act relates to *superfluous lands*, but that term does not include easements, &c., held with the land. This land, which supports the station arch, is an integral part of the railway. The 45th sect. of the Railways Clauses Act giving power to take certain land for extraordinary purposes, such as additional stations, &c., confers a power to sell the land so taken; but beyond the right of selling that limited quantity, and the right of selling superfluous lands, there is no power of sale. The inclusion of the power to a limited extent excludes that of any larger power. It is a mistake to suppose that railway companies have the ordinary rights of owners in

fee. Many corporations have limited powers of enjoyment and alienation—notably, corporations ecclesiastical, sole and aggregate, charitable and municipal corporations.

Then as to the rights of a railway company which uses another railway company's property under a working agreement. The user is for the purpose of traffic present or future—the agreement says “for developing traffic.” Those who have granted to the company the right to use the station for traffic purposes have granted the right to use the land under the station arch for the purpose of a yard for loading or unloading, and of excluding the public. The plaintiff bought with notice of this title, and on that ground also he fails.

COMMENT.

In *Ware v. London, Brighton and South Coast Rail. Co.*, 52 L. J. R. Ch. 198, Pearson, J., explained that what the M. R. here in effect decided was that a railway company could not in a case of the kind sell the floor of a house, keeping the roof only. The principle does not extend to restrain the company from selling a field on the other side of their boundary wall as “superfluous land.” They are not obliged to retain so much land on the further side of the boundary wall as will lie between that wall and a vertical line from the footings of that wall.

In re **Buck**, *Ex parte* **Sheriff of Middlesex**.

[48 L. J. R., Bank. App. 33; L. R., 10 Ch. Div. 575.]

The Court of Bankruptcy has, under sect. 65 of the Bankruptcy Act, 1869, the Superior Court jurisdiction in interpleader, under 2 Will. 4, c. 58.

COMMENT.

And see now 46 & 47 Vict. c. 52, Part VI.

In re **Shepherd**, *Ex parte* **Shepherd**.

[48 L. J. R., Bank. App. 35; L. R., 10 Ch. Div. 573.]

The M. R.: A woman who carried on business in her own name married, and continued to carry on business in her

maiden name. The husband gave notice that he would not be liable for the debts of the business. A creditor draws bills on the wife for goods supplied, which she accepts, and then absconds. The creditor then takes out a debtor's summons against the husband. He denies liability, and, in the evidence as it stood, was not liable. This is an abuse of the bankruptcy procedure, which was never intended to apply to cases of the kind. The creditor should bring an ordinary action.

In re Pollard & Co., Ex parte Dickin.

[48 L. J. R., Bank. App. 36; L. R., 8 Ch. Div. 377.]

An ordinary money demand by the trustee of a bankrupt against a stranger should be enforced by action, and the Court will not assume jurisdiction under sect. 72 of the Bankruptcy Act, 1869.

The M. R.: The question arises whether there is any jurisdiction to make the order sought for payment of a demand as above. The contention logically carried to a conclusion goes to this extent, that if a man who claimed a landed estate of which he was not in possession became bankrupt, the Court of Bankruptcy could try an action to recover the land.

Levy v. Walker.

[48 L. J. R., Ch. App. 273; L. R., 10 Ch. Div. 436.]

A man may trade in the name of another man unless he is violating a trade mark or a trade name. If I choose to carry on business in your name, you not being in the business, you cannot interfere with me (James, L.J.).

The M. R.: With the exception of an unlucky dictum of Lord Cairns in *Maxwell v. Hogg*, 36 L. J. R., Ch. 433; L. R., 2 Ch. 307, which talks of the property in a name, the L. C. forgetting the common law right to take any name, there is no pretence for the notion that a man has such a property in

it as that he can prevent another from taking it. A false statement as to identity would, of course, under some circumstances, be indictable. But the real person then could not interfere; the complaint must come from the person who was deceived by the statement.

The assignment of a goodwill includes, as against the assignor, the exclusive right to continue the use of the name and style of the firm whose business is assigned, and this is so, even if the name of the assignor is the name or part of the name of the firm.

The London Assurance v. Mansel.

[48 L. J. R., Ch. 331; L. R., 11 Ch. Div. 363.]

In contracts of life, fire, or marine assurance perfect good faith is required. If a man desirous of insuring conceals anything which he knows to be material, it is a fraud. The fact that other offices have declined the insurance is material. Concealment means non-disclosure of a fact which it is a duty to state. Here the form of questions as to prior insurances was evaded by the answer, "insured now in two offices at ordinary rates." It is not competent for the assured afterwards to say, "I did not answer untruly, for I did not answer at all." He was bound to answer fully.

Re Hardley.

[48 L. J. R., Ch. App. 335; L. R., 10 Ch. Div. 664.]

If a trustee paying into Court under the Trustee Relief Act does not know the address of the person entitled to the fund, the Court cannot dispense with the notice directed by Ord. IV., Chancery Funds Amendment Orders, 1874, nor direct how it shall be served. The Court, however, suggested that if a letter were written to the last known address, and advertisements issued in the colony where the person was supposed to be, it would be considered that what was necessary had been done.

The London and County Banking Company v. Dover.

[48 L. J. R., Ch. 336; L. R., 11 Ch. Div. 204.]

In an ordinary foreclosure action neither sect. 48 nor sect. 55 of the Chancery Procedure Act, 1852, authorized the Court to direct a sale on an interlocutory application.

Daris v. Ashwin, 47 L. J. R., Ch. 70, questioned.

Bramwell v. Lacy.

[48 L. J. R., Ch. 339; L. R., 10 Ch. Div. 691.]

A lease of a residential house contained a lessee's covenant not to carry on upon the demised premises "any trade, business, or dealing whatsoever, or anything of the nature thereof, or be party to or suffer any act or thing which may be or grow to the annoyance, damage, injury, prejudice, or inconvenience of the neighbouring premises."

The lessee converted the house into a hospital, frequented by patients, who are treated and supplied with drugs, and some patients pay for medical attendance. The hospital is not carried on for pecuniary profit, except as above, and it is for throat and chest diseases. Some of the former at least are contagious. This is really an apothecary's "business" or "in the nature of a business." I think it is a "business."

**In re The Horbury Bridge Coal, &c., Company
(Limited).**

[48 Ch. App. 341; L. R., 11 Ch. Div. 109.]

The question is as to the validity of the election of a liquidator, and the manner in which votes of shareholders in a limited company, the rules of which are that there shall be a vote for every share, should be taken.

The common law of all meetings is that you take votes by show of hands. When a poll is demanded and taken votes are to be counted according to the number of shares—here a

vote for every share. In other companies, notably in railway and parliamentary companies, the number of the votes increases. There is nothing in these rules to provide for any other method of voting than by the show of hands. The 51st section of the Act says that a special resolution is to be passed by a majority of not less than three-fourths of such members entitled to vote as may be present in person or by proxy at any general meeting, confirmed by a majority of such members as may be present in person or by proxy at such general meeting. Unless a poll is demanded by five members a declaration by the chairman that a resolution has been carried shall be conclusive evidence. In computing the majority when a poll is demanded reference shall be had to the number of votes to which each member is entitled by virtue of the regulations of the company. Therefore, as to a special meeting, there is an irresistible inference that what is to be done when a poll is demanded is not to be done when a poll is not demanded. So in the 179th section. The Sched. Table A, Art. 43, confirms the view that, on a show of hands, every man has one vote and the chairman has a casting vote. Here there were five persons present in person. Two voted for K., three against him. The two who voted for K. held more shares than the three who voted against him, but no poll was demanded. K. is not validly elected.

Gilbert v. Smith.

[48 L. J. R., Ch. App. 352; L. R., 11 Ch. Div. 78.]

The 5th section of the Partition Act, 1868 (31 & 32 Vict. c. 40), does not apply where the 3rd section does.

COMMENT.

The L.J.J. James and Bramwell here agreed with the M. R., who had decided as above also in *Drinkwater v. Ratcliffe* (44 L. J. R., Ch. 505, *ante*); and the House of Lords confirmed this view in *Pitt v. Jones* (H. L.) (49 L. J. R., Ch. 795; L. R., 5 App. Cas. 65).

In re Capon's Trusts.

[48 L. J. R., Ch. 355; L. R., 10 Ch. Div. 484.]

In my opinion, the decision of the M. R. for Ireland in *Minchin v. Minchin* (7 Ir. Ch. R. 267) is wrong.

The words of the settlement here are, "upon trust to pay or divide unto, or between or amongst all and every the child and children of the marriage in such parts and proportions, manner, and form as the survivor of the husband and wife shall at any time appoint, and in default of appointment equally." The surviving wife appointed the trust fund by an irrevocable appointment, executed after The Illusory Appointments Act, thus:—"Unto and amongst the three children of the marriage (naming them) and the survivors and survivor of them equally, and if only one of them should survive, then to that one only."

One child predeceased the appointor, but died after execution of the deed and attainment of her majority. It is contended that as the interests of the children were contingent on survivorship of their mother the appointment was void.

An illusory appointment means one which apparently gives a benefit but in reality does not do so. The meaning of the Act was that where there was even the appearance of an appointment it should be deemed a valid exercise of the power. The appointment to the two survivors is good.

[*Minchin v. Minchin*, *ubi sup.*, is doubted by Lord St. Leonards—"Powers," 450.]

Luke v. The South Kensington Hotel Company.

[48 L. J. R., Ch. App. 361; L. R., 11 Ch. Div. 204.]

The M. R.: An action for foreclosure may be brought by one of three mortgagees, making the other two defendants, if they will not be co-plaintiffs. *Fowler v. Wyatt*, 24 Beav. 232, but not reported on this point, is one authority for this, and *Adams v. Paynter*, 1 Coll., C. C. 533, another.

Of course you must not capriciously, and without substantial reason, make persons defendants when they should be plaintiffs. Where such reason exists there is no inconvenience. It is said one might wish to foreclose and the others might not. That is not the case here.

Two out of three trustees cannot bind *cestui que trusts*. A majority of trustees cannot bind a minority.

COMMENT.

For the purposes of a redemption action a trustee either as plaintiff or defendant sufficiently represents his *cestui que trusts*. In a foreclosure action all the parties interested in the equity of redemption must be before the Court. *Mills v. Jennings* (App.), 49 L. J. R., Ch. 209; L. R., 13 Ch. Div. 639, explaining *Goldsmid v. Stonehewer*, 9 Hare, App. XXXVIII.

Harrison v. Wearing.

[48 L. J. R., Ch. 365; L. R., 11 Ch. Div. 206.]

If a witness cause in the Chancery Division lasts more than one complete day, refreshers to counsel for the second and following days may be allowed on taxation. But the question of allowing refreshers at all, and the amount to be allowed, are in the discretion of the taxing master.

Smith v. Buller, 45 L. J. R., Ch. 69; L. R., 19 Eq. 473, disapproved (V.-C. Malins).

Duncan & Co. v. The North and South Wales Bank.

[48 L. J. R., Ch. App. 376; L. R., 11 Ch. Div. 88; on appeal to the H. L., 50 L. J. R., Ch. 355; L. R., 6 App. Cas. 1.]

The equity between the indorser and the acceptor of a bill of exchange paid by the former on dishonour by the latter, is the same as that between a surety and a principal debtor when the creditor is not a party to the contract of suretyship. Such equity attaches when bills, overdue and dishonoured, and securities given to cover them, are found together in the hands of the secured creditor, when he

requires payment from the indorser; when the creditor has no other transactions then pending with the customer and no claim upon the securities except for the bills; and when the competition is between the indorser and the acceptor only. The interest whether of a sole debtor or of one of two or more joint debtors, is not to be regarded in competition with the equity of anyone who is in the nature of a surety for him, and whom he is bound to indemnify. There is nothing in the above to paralyze the business of discounting bills of exchange, for bankers or those who hold bills accepted by customers and indorsed by a third person may vary the securities received from the customer according to the ordinary course of dealing so long as the customer remains solvent, and before the acceptance has been dishonoured.

Pringle v. Gloag.

[48 L. J. R., Ch. 380; L. R., 10 Ch. Div. 676.]

If A. is ordered to pay costs to B., and B. is ordered to pay costs to A., the taxing master sets off one set against the other. Here A. is ordered to pay a sum of money to B., and B. is ordered to pay costs to A., the result on balancing being that there is a balance due from B. to A. But A. absconds, and cannot pay what he is ordered to pay to B. B. says, "Set off the sums and I will pay the balance." A right of set-off here is a matter of common sense. But it is said B. cannot claim a set-off because A.'s solicitor has a lien on the costs ordered to be paid by B. The lien is only *on costs payable to his client*. The right of set-off is therefore paramount to any lien.

COMMENT.

See also *Robarts v. Buée*, 47 L. J. R., Ch. 414; L. R., 8 Ch. Div. 198, and observations there made on *Ex parte Cleland*, 36 L. J., Bank. 33; L. R., 2 Ch. Div. 808.

Standering v. Hall.

[48 L. J. R., Ch. 382 ; L. R., 11 Ch. Div. 652.]

A married woman, entitled to a share in purchase-money representing real estate sold by order of the Court in a partition action, may, by separate examination in Court, elect to have her share treated as personalty and paid out to her husband.

COMMENTS.

Even where the share was under 200*l.* V.-C. Bacon required a separate examination, as above, in *In re Shaw*, 49 L. J. R., Ch. 213 ; but the subject came before the M. R. in *Wallace v. Greenwood*, 50 L. J. R., Ch. 289 ; L. R., 16 Ch. Div. 362, and he, in a case where the fund was under 200*l.*, dispensed with the separate examination and made an order for payment out to her on her separate receipt and an affidavit of no settlement. The M. R. also there decided (disapproving V.-C. Bacon's decision in *Crookes v. Whitworth*, L. R., 10 Ch. Div. 289) that an order for the sale of a married woman's share of real estate, made with her consent or at her request, under sect. 6 of the Act, operated as a conversion of such share into personalty, but that a request under the Act should be made by some one specially appointed by her for the purpose, and that counsel's request on her behalf at the trial is not sufficient. This request should be by signed authority to her solicitor, directing him to instruct counsel to consent to a sale. (*Grange v. White*, L. R., 18 Ch. D. 612 ; 50 L. J., Ch. 620 (V.-C. Hall.)

Ex parte The Mercers' Company.

[48 L. J. R., Ch. 384 ; L. R., 10 Ch. Div. 481.]

The combined effect of the Judicature Act and the Rules thereunder is to give the Court a general discretion as to costs in all cases not thereby specially excepted. The Court is not, therefore, bound by any provision, or omission of provision, as to costs prior to the above Act.

Child v. Stenning.

[48 L. J. R., Ch. App. 392; L. R., 11 Ch. Div. 82.]

This was an action for breach of a covenant in a lease for quiet possession, the breach being the exercise by another lessee of the same lessor of a right of way, which right was established in an action against the first-named lessee, and involved payment by such lessee of the costs of the action.

The M. R. : The measure of damages, where there has been disturbance but not eviction, is the actual damage sustained up to issue of writ. Unless actual damage be proved the amount given will be nominal, or 40*s.* But as the error of the original lessor caused the action, he must pay the costs which the plaintiff had to pay to the person who established his right of way. The decision in *Williams v. Burrell* (1 Com. B. R. 402) is somewhat analogous, and we approve that.

Re Stanhope Silkstone Collieries Company, Limited.

[48 L. J. R., Ch. App. 409; L. R., 11 Ch. Div. 160.]

The M. R. : A garnishee order nisi for attachment of debt does not give the judgment creditor any charge or lien on the debt until it has been served on the garnishee. It is an imperfect execution. By sect. 10 of Judicature Act, in the winding-up of companies, the rights of secured and unsecured creditors are to be regulated by Bankruptcy Rules. There having been no service of the order here the creditor is not "secured." Independently of that, the 163rd section of the Companies Act makes void any attachment not put in force against the estate and effects of the company before the commencement of the winding-up. This debt due from the garnishee to the company is certainly part of its effects. It was not enforced, and is therefore avoided by sect. 163.

Burnell v. Burnell.

[48 L. J. R., Ch. 412; L. R., 11 Ch. Div. 213.]

In a partition suit the defendant (a tenant in common with plaintiff) admitted, by his statement of defence, plaintiff's title, but said that he did not desire a partition, but a sale of the whole property. He also said that the plaintiff had been in entire possession for several years, and he claimed an account of rents and profits.

The M. R. said he had jurisdiction under sect. 4 of the Partition Act, 1868, to direct an immediate sale, founded on admissions in the pleadings, and would do so. At the defendant's request he added an account of rents and profits received within the last six years.

Kusel v. Watson.

[48 L. J. R., Ch. App. 413; L. R., 11 Ch. Div. 129.]

The action was for specific performance of an agreement, dated 24th June, 1839, made between S., who held a lease of the premises for eighty years, expiring in 1898, of the one part, and K. of the other part, whereby S. agreed to let K. "have a lease of the premises at the yearly rent of 26*l.*, with all taxes, &c., at any period he may feel disposed, and hereby further agrees not to molest, disturb, or raise the rent of the said K. after his having laid out money in improving the said premises."

K. took possession, and expended about 150*l.* in improvements, and had remained so in possession under the agreement ever since. In December, 1876, the executors of S. threatened ejectment. Thereupon K. brought his action, claiming specific performance.

The M. R. : S. had a long lease, but it is not averred that the plaintiff knew what that lease was, *i.e.*, how long it extended. I think the agreement means that if K. lays out money he is not to be disturbed at all, that he is to have a

lease for his life, to keep possession during his life if so minded. The lease must be for ninety-nine years, less one day, if lessee shall so long live.

[Consider *Re King's Leasehold Estates*, L. R., 16 Eq. 521.]

In re The Stockton Iron Furnace Company.

[48 L. J. R., Ch. App. 417; L. R., 10 Ch. Div. 335.]

The M. R.: The question arises upon the attornment clause in this ordinary banker's mortgage, and is whether thereby a *bonâ fide* tenancy was created or whether it is an extortionate and sham rent which is reserved. It is the common practice where a mortgagor is occupying the property to create a tenancy. The mortgage here is in the ordinary form. I am not satisfied that the rent is excessive. The valuers differ about it. It is said that the creation of a tenancy is repugnant, in its effects, to the bankruptcy law. But sect. 34 of the 1869 Act gives the landlord the preference as to a year's rent.

I altogether assent to *Ex parte Williams* (47 L. J. R., Bank. 26; L. R., 7 Ch. Div. 138). But the rent here is *bonâ fide*.

COMMENTS.

If the circumstances show that the attornment clause is a mere device to enable the mortgagee to get a preference in case of bankruptcy, it will not avail. *Ex parte Jackson, In re Bowes*, L. R., 14 Ch. Div. (App.) 725. In this case the rent was shown to be nearly seven times the actual letting value.

Sect. 6 of The Bills of Sale Act, 1878, now renders it necessary to register documents which contain attornment clauses as bills of sale. As to instruments executed before the Act of 1882 (45 & 46 Vict., c. 43), *i. e.* between 1st January, 1879, and 1st November, 1882, the registration would be necessary, as against a trustee in bankruptcy or an execution creditor. And as to documents executed after 1st November, 1882, such documents must be registered to give any validity at all to the attornment clause. Other cases upon the effect of the attornment clause are *Ex parte Punnett, In re Kitchin*, L. R., 16 Ch. Div. 226 (50 L. J. R., Ch. App. 212), where the mortgages were before the Bills of Sale Act,

supra; the M. R., incidentally remarking that the good-will of a public-house (which was the subject of the mortgage) passes with the public-house to a purchaser or mortgagee. It is not a *personal* good-will, but the mere habit of customers to resort there. Here the first mortgagee of a leasehold public-house took a proviso for attornment to secure his interest; the second mortgagee did the same. The second mortgagee admitted on its face the existence of the first mortgagee. We think the second mortgagee had, after bankruptcy of the mortgagor, the right to distrain for a year's rent under this attornment. The case is really decided by *Morton v. Woods*, 37 L. J. R., Q. B. 242; 9 B. & S. 632; L. R., 3 Q. B., 658; affirmed, 9 B. & S. 650; 38 L. J. R., Q. B. 81; L. R., 4 Q. B. 293. A tenancy was created by the help of the legal fiction of *estoppel*. If this were not so, the second of two mortgagees taking such attornments under the same deed, the two thereby agreeing that one should be first and the other second, would have a good attornment; while if one mortgage were dated a day after the other the second would be bad. The attornment is a mere superadded security, and does not substitute the character of landlord and tenant for that of mortgagee and mortgagor as to any other matter than the mere effectuation of that superadded security. Thus the mortgagee with such a security will retain his rights to *fixtures*, which rights are much larger than those of a mere landlord (see *Climie v. Wood*, 38 L. J. R., Exch. 223; L. R., 4 Exch. 328, &c.). In *In re Threlfall, Ex parte Blakey*, L. R., 16 Ch. Div. 274; 50 L. J. R., Ch. App. 318, the clause of attornment, at a yearly rent, with a proviso that the mortgagees might at any time after a named day, without previous notice, enter and take possession, and determine the tenancy, was held by L.JJ. James, Cotton and Lush to create a tenancy from year to year, determinable at the will of the landlord, and that the right of distress after bankruptcy was as given by sect. 34 of the Bankruptcy Act, 1869. In *Morton v. Woods* there had been no actual demise, the mortgagee not having executed the deed, and so a tenancy at will was held to have been created. [A tenancy at the will of one party must necessarily be determinable at the will of the other, Co. Litt. 55a.] In *In re Betts, Ex parte Harrison*, 50 L. J. R., Ch. App. 832, it was held by Lord Selborne and L.JJ. Brett and Cotton that if a distress levied after liquidation of the mortgagor under the ordinary attornment clause more than pays the interest, the mortgagee may, as against the trustee in liquidation, unless there is a contrary provision in the mortgage, apply the surplus in reduction of the principal (*Hampson v. Fellows*, 37 L. J. R., Ch. 694; L. R., 6 Eq. 575, questioned). Again, the whole subject was discussed in *Ex parte Voisey, Re Knight*, L. R., 21 Ch. Div. 442; 52 L. J. R., Ch. App. 121, where the M. R. gave judgment in substance as

follows :—I never heard of an attornment clause being executed by the landlord. The tenant is estopped from denying the tenancy. The *bond fides* of the rent and of the intention to create a fair tenancy at a fair rent is of course a question of fact in each case. Here the monthly rent reserved by the building society whose mortgage this is, is variable, necessarily, but there is no objection on that ground. We are all familiar with such rents—*e.g.*, there are penal agricultural rents for ploughing up pasture land, &c. So in building and improving leases where the rents vary according to the performance of various acts, some by the landlord and some by the tenant. Again, in agricultural leases there is the increased rent made payable on drainage being done. The Statute of Frauds does not apply, because this tenancy might not last one year, and, as already stated, the landlord need not execute the deed.

In *Stanley v. Grundy*, L. R., 22 Ch. Div. 478 ; 52 L. J. R., Ch. 248, V.-C. Bacon decided that the clause of attornment does not imply that the mortgagee is to be dealt with as if he had been in possession. He must go into possession under the clause before he is so treated.

In *Kearsley v. Philips*, 52 L. J. R., Ch. App. 581, it was held that this attornment clause gives the mortgagee all the incident rights of the landlord as to distress, and therefore the right to distrain on the goods of third persons on the premises, although such third persons have no notice of the mortgage.

***In re The West Jewell Tin Mining Company,
Weston's Case.***

[48 L. J. R., Ch. App. 425 ; L. R., 10 Ch. Div. 579.]

If a *prima facie* case of misfeasance is made out against a director or person standing in a fiduciary position towards a company, the onus to disprove that case is on such fiduciary. He should adduce all his proof before the Court of first instance, and, as a general rule, if he does not do this the Court of Appeal will not allow fresh evidence. Here parol proof that a transaction took place at an hour of day which would make it legal was sought to be adduced on appeal, contrary to other evidence given below. The person who could alone contradict this was dead. Evidence not admitted.

The Attorney-General v. The Great Eastern Railway Company.

[48 L. J. R., Ch. App. 428; L. R., 11 Ch. Div. 469; on appeal to H. L., 49 L. J. R., Ch. 545; L. R., 5 App. Cas. 472.]

Where an Act incorporates a body, such as a railway company, for a particular purpose, and gives powers for that purpose, that which is not expressly or impliedly included in such powers is in effect prohibited.

Whether if a railway company acts *ultra vires*, whether by way of plain and substantial public mischief or in mere excess of statutory power not involving such mischief, the Attorney-General (representing the Crown) should sue, is, by the above case, left doubtful.

The M. R. and the L. J. Baggallay thought that any excess warranted the interference of the Attorney-General; L.JJ. James and Bramwell thought there must be substantial public mischief. The Law Lords expressed no opinion as to this.

Price v. Price.

[48 L. J. R., Ch. App. 478; L. R., 11 Ch. Div. 163.]

Here P. owed W. 2,400*l.*, secured by P.'s bond, payable by annual instalments. In 1869 W. died, having by will appointed P.'s wife her sole executrix and residuary legatee. In 1870 P. and his wife passed the residuary account of W. without including the bond debt, and P. applied to his own use the residuary estate of W. P. took possession of the bond and kept it until his death, in 1871. In 1876 P.'s estate was being administered by the Court, and his widow sought to prove for the bond debt. Held that P. had reduced the bond debt into possession, and that the debt was extinguished.

The M. R. : The general rule is that obligations between husband and wife are destroyed by marriage except as regards the rights of third parties, viz.: where the wife holds the

obligation as legal personal representative, and its extinguishment would affect the rights of creditors or legatees. There the rule ceases.

But where the wife is both legal personal representative and residuary legatee, and the debts and legacies have been paid, the reason for the exception ceases. The passing of the residuary account by the wife, stating that all the debts had been paid, and appropriation by the husband of the residue, show extinguishment.

COMMENT.

The Married Women's Property Act, 1882, will, of course, alter the rule itself.

Hamer v. Giles—Giles v. Hamer.

[48 L. J. R., Ch. 508; L. R., 11 Ch. Div. 942.]

Seton on Decrees, 4th ed., p. 1206, contains the following as to the costs of dissolution of partnership actions. "The rule is that the Court makes no order as to costs up to the judgment, even though the cause of the dissolution is the negligence of a partner."

The M. R.: In my opinion this is not correct. The rule I act on is that where there is no fault on either side, but the partnership accounts have to be taken in Court, the costs of the action for taking the accounts are from the beginning to be dealt with as all other costs of necessary administration, *i.e.*, they must come out of partnership assets. Where there has been misconduct the Court makes the partner guilty of it pay the costs occasioned thereby.

A charging order in favour of a solicitor, under the 1860 Act, is sufficiently intituled in the action or proceeding in which the property is recovered.

COMMENT.

Another decision of the M. R. as to costs of a dissolution action is *Austin v. Jackson*, L. R., 11 Ch. Div. 942, n.; and this was considered and approved by V.-C. Hall in *Potter v. Jackson*, 49 L. J. R., Ch. 232; L. R., 13 Ch. Div. 844. Where the partnership is indebted to one or more of the partners, *e.g.*, for rent

of partnership premises, such debt is to be treated on the same footing as a debt to anyone else, *i. e.*, has to be provided for before the partners can take interest. The costs of the action are therefore payable out of the net partnership assets after paying such a debt and all other debts.

The Sevenoaks, &c. Railway Company v. The London, Chatham and Dover Railway Company.

[48 L. J. R., Ch. 513 ; L. R., 11 Ch. Div. 625.]

The A. Railway Company were by an Act authorized to construct a railway. By a working agreement scheduled to and forming part of the Act, the B. Railway Company were empowered, on certain terms, to "work and maintain" the same in perpetuity. A. company constructed the line, and B. worked it. A. company afterwards erected certain steps as an improved means of access to one of their stations, and the B. company removed these steps. A. company sought a mandatory injunction to restore these steps and an injunction to restrain after interference therewith.

The M. R. : The question is whether under the ordinary working agreement (which this is) the working company is entitled to the exclusive possession of the railway and works and to the exclusive right of maintenance. The construction of the steps was fairly a work of maintenance. The term is large, and includes useful and reasonable ameliorations, *e. g.*, banks on a river might be faced to keep them up, although, as originally constructed, such facing might not be necessary. Decaying wooden palings might be replaced with iron ones. Deep cuttings might be faced with brick. An inconvenient railway station requiring repair might be altered as to construction and arrangement of rooms, and as to access to it. Amelioration (to a reasonable extent) may be contemporaneous with reparation. You may maintain by keeping it in the same state or by keeping it in the same state and improving that state, provided it is maintenance and not alteration of purpose. A line cannot be worked contemporaneously by two companies ; the working must be

exclusive, and so must the maintenance. If it were otherwise both companies might send down gangs of men, say to relay plates, at the same time. (*Beman v. Rufford*, 20 L. J. R., Ch. 537; 1 Sim., N. S. 550, and *Winch v. The Birkenhead and Lancashire and Chester Junction Railway*, 5 De G. & S. 562, support my views.)

Sykes v. Beadon.

[48 L. J. R., Ch. 522; L. R., 11 Ch. Div. 170.]

An unregistered association of more than twenty persons was formed, under the provisions of a trust deed, in 1872, to buy foreign bonds and other securities below par, and, after payment of expenses and a fixed rate of interest to all members, to divide the profits by sale of the bonds or payment off of them at par, amongst some of the members who were to be chosen by lot at annual drawings for that purpose. The trust deed set out in detail the working of the scheme. An action was brought against a former trustee for alleged breaches of trust.

Held that as the association was not registered it was, under sect. 4 of the Companies Act, 1862, void as an association for gain unregistered, and that no action would lie.

COMMENTS.

See now, however, *Smith v. Anderson* (50 L. J. R., Ch. App. 39; and L. R., 15 Ch. Div. 247), in which the L.J.J. overruled the M. R. and disapproved of the above decision, and Brett, L.J., also questioned the M. R.'s decision in *In re The Arthur Average Association*, 44 L. J. R., Ch. 569 (*ante*).

The L.J.J. (James, Brett and Cotton) held that this was not a business carried on for the acquisition of gain within the section, but the holding and management of a trust fund with powers incidental to such management. Brett, L.J., said that the transactions within the company, between the members themselves, could not be considered as affording any evidence of the nature of the association. But in *In re The Padstow, &c., Co.* (51 L. J. R., Ch. App. 54) he withdrew his expression of disagreement with

the M. R. as to the case of *The Arthur Average Association and Marine Mutual Assurance Societies*. See this case, *post*.

The M. R. suggested also whether the arrangement did not amount to an illegal lottery within the Lottery Act; but in *Wal-lingford v. The Mutual Society* (50 L. J. R., H. L. (Q. B. &c.) 49; L. R., 5 App. Cas. 685) the H. L. held that a society formed to make advances to its members, selecting by lot the members to receive the advances, is not illegal under the Lottery Acts.

Arthur v. Mackinnon.

[48 L. J. R., Ch. 534; L. R., 11 Ch. Div. 385.]

A testator bequeathed his plate and plated articles to trustees upon trust to permit A. "to have and appropriate absolutely to herself such parts thereof as she should at any time before the expiration of twelve months after his decease signify her desire to possess." Held that A. could appropriate *all* the plate and plated articles. She might leave something valueless, and *de minimis non curat lex*.

Woodard v. The Billericay Highway Board.

[48 L. J. R., Ch. 535; L. R., 11 Ch. Div. 214.]

The 65th section of the Highway Act, 1835 (5 & 6 Will. 4, c. 50), empowers justices to order trees, &c., overhanging a highway to be pruned or lopped by the "owner." The summons in this case was served only on the tenant. Held that the word "owner" here meant the person in actual occupation, either as owner or tenant.

Re The Crumlin Viaduct Works Company.

[48 L. J. R., Ch. 537; L. R., 11 Ch. Div. 755.]

The reputed ownership clauses in the Bankruptcy Act, 1869, do not apply to the winding-up of companies under the Acts of 1862 and 1867.

The Bankruptcy Rules hereon do not necessarily affect the rights of creditors, but those of the owners whose property is in the reputed ownership of the bankrupt. The true owner may or may not be a creditor. The 10th section of the Judicature Act cannot extend to include these reputed ownership rules. It cannot be contended that the rules apply to a man who is not a creditor. Therefore, if such a man allows a company to remain reputed owners of the goods, he does not lose them if he is absolute owner, or even if he is a mortgagee or pledgee. But, according to this argument, he is to lose the benefit if he is a creditor. A company cannot be bankrupt. The true owner here could not have taken the goods out of the hands of the company.

Re Uruguay, &c. Railway Company.

[48 L. J. R., Ch. 540 ; L. R., 11 Ch. Div. 372.]

The petitioner for winding-up was the holder of a mortgage bond of a very peculiar kind, amounting to a covenant with the trustees to pay according to the provisions of the deed to the bearer of the coupon. The company are to pay the trustees, who are to pay over to bearers of coupons. There is no direct debt from the company to the bearer. The company must not be sued twice, and are certainly liable to the trustees. Then this creditor, at best a *pari passu* creditor for 600*l.* with others for 142,700*l.*, is unsupported by any others, nay is opposed by all the others, who did not wish a winding-up. Under the 91st section, I should in any event exercise my discretion by refusing the order.

In re Ridley (deceased), Buckston v. May.

[48 L. J. R., Ch. 563 ; L. R. 11 Ch. Div. 645.]

A fund was given to a person for life, and after her decease to her children, accompanied, as to daughters or female issue, by a restraint against anticipation.

The M. R. : The law on this seems to me to be in an unsatisfactory state. The doctrine and policy of the law require all property to be alienable. Inalienability in any shape is not recognised except in the case of restraint on anticipation by a married woman. That is an equitable doctrine, the invention of the Chancellors, to secure the enjoyment of separate property. There is another rule, also invented by the Chancellors, but this time in favour of alienation. The original supposition of our law was that absolute ownership ought to last for ever. Practically that amounted to inalienation. In order to remedy that the Chancellors restricted inalienability to a life interest, and twenty-one years afterwards. The question is whether the rule in favour of restraint is to override that against remoteness, or *vice versa*.

In an ordinary marriage settlement with power of appointment amongst children, if the exception applies to the rule against remoteness, they can appoint to such daughters with restraint on anticipation. If not, no restraint could be imposed. In my opinion the rule which is applied to the universal ought to be applied to the particular, so as to allow a daughter in such a case to be restrained from anticipation during coverture. *Thornton v. Bright* (6 L. J. R., Ch. 121 ; 2 Myl. and Cr. 230), and *Fry v. Capper* (Kay, 163) support my view ; but as V.-C. James, in *Re Teague's Settlement* (L. J. R., 10 Eq. 564), V.-C. Malins, in *Re Cunynghame's Settlement* (40 L. J. R., Ch. 247 ; L. R., 11 Eq. 324), and V.-C. Hall, in *Re Michael's Trusts* (46 L. J. R., Ch. 651), have held otherwise, I must follow these decisions. Not one of the judges appears to have considered the point however. My own independent decision would have been to the opposite effect, and I think the point open for the Court of Appeal.

COMMENT.

In *Herbert v. Webster* (49 L. J. R., Ch. 620 ; L. R., 15 Ch. Div. 610) V.-C. Hall had to reconsider the matter, and expressed himself as dissatisfied with his decision in *Re Michael's Trusts* (*supra*). In the case then before him he distinguished between

daughters who were *in esse* at the date of the settlement, and held the restraint validly imposed as to them. For this purpose he would hold the gifts to have the same effect as if they had been separate.

Mason v. Harris.

[48 L. J. R., Ch., App. 589; L. R., 11 Ch. Div. 97.]

The M. R. : For fraud committed on a company the rule is that the company alone must sue (*Macdougall v. Gardiner*, 45 L. J. R., Ch. 27; L. R., 1 Ch. Div. 13). But there are exceptions to this rule. One is that if a fraud has been committed by persons commanding a majority of the votes in a company, the minority can sue on behalf of themselves and all the other shareholders of the company. This exception was established by *Attwood v. Merryweather* (37 L. J. R., Ch. 35; L. R., 5 Eq. 464, n.), and confirmed by *Menier v. Hooper's Telegraph Co.* (43 L. J. R., Ch. App. 330; L. R., 9 Ch. Div. 350). In *Duckett v. Gower* (46 L. J. R., Ch. 407; L. R., 6 Ch. Div. 82) the company were not joined as co-plaintiffs by an oversight of the pleader. The case stood over for a fortnight for plaintiff to obtain the consent of the company, and they obtained that consent. Afterwards the defendants moved to strike out the name of the company, alleging that they had been added without authority, but as I was satisfied that they had consented, I refused the motion.

In re Pumfrey, Ex parte Hillman.

[48 L. J. R., Bank., App. 77; L. R., 10 Ch. Div. 622.]

The M. R. : We have to decide the meaning of the word "purchaser" in the 91st sect. of the Bankruptcy Act, 1869, providing that any settlement of property made by a trader, not being a settlement made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, shall be void as against the trustee if the settlor becomes bankrupt within two years from the date of the settlement. It is

argued that, because this is a settlement of leaseholds, and the trustees covenant to pay the rent and observe the covenants in the lease, they are purchasers for valuable consideration. But in this section the word "purchaser" is evidently used not in its technical legal sense, but in its ordinary sense of "buyer." That is plain from the contrast with the word *incumbrancer*, because in the legal sense every incumbrancer is a purchaser. It is, therefore, out of the question to say that these trustees for settlor's wife and children are in any sense purchasers for valuable consideration, and, therefore, this settlement is void.

COMMENTS.

It is evident that the above case was taken to the Appellate Court in consequence of the decision of that Court in *Price v. Jenkins*, 46 L. J. R., Ch. App. 805; L. R., 5 Ch. Div. 619, that there cannot be a voluntary settlement of leaseholds within the 27 Eliz. c. 4, inasmuch as the assignees necessarily assume a liability at law in respect of the rents and covenants, and this although the assignees are trustees, who do not enter into any express covenants. Upon this case James, L. J., observed, in the above matter, that it was a decision on another statute passed for another object—viz., to prevent fraud. The M. R., in the above case, expressed disapproval of the decision in *Price v. Jenkins*. Can it be supported even under the 27 Eliz. c. 4? Is not the liability to rent and covenants a mere inseparable incident to the very tenure of property? The statute expressly mentions the "*assignment of a lease*," as within its provisions (sect. 4). That being so, is not the argument that the liability to rent and covenants as a necessary incident of the assignment makes the assignment valuable, self-destructive, so to speak? No addition to the value passes by the assignment. The lease, containing the reservation of rent and the covenants, is the very property assigned. It may either be voluntarily assigned (as appears to have been the case in *Price v. Jenkins*) or assigned for value. If a lease is not worth more than the performance of its covenants will entail, of course it is valueless, and, in case of bankruptcy, would be disclaimed by the trustee as onerous. Surely *Price v. Jenkins* requires reconsideration. See *In re Ridler, Ridler v. Ridler*, 52 L. J. R., Ch. App. 343 (*post*), for a decision that at any rate it does not apply to cases under 13 Eliz. c. 50. See also the M. R.'s judgment in *Hawkins v. Hawkins*, 44 J. P. 329, where he held that dilapidations on a house specifically bequeathed are to be paid out of the house, and not out of any other property which the testator may have charged with the

payment of his "debts." As between beneficiaries under the same will, the cases in which such a liability has been considered a *debt* do not apply. The liability in question is an inseparable incident of the very tenure.

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In re Whitting, Ex parte Hall.

[48 L. J. R., Bank., App. 79; L. R., 10 Ch. Div. 615.]

W. verbally agreed with H. & Co. that he, W., on consideration of 200*l.* advanced to him by H. & Co., would give them a charge on his future rents. In pursuance of that agreement W. handed to H. & Co. a letter, as follows, directed to his (W.'s) tenants. "July 16th, 1877. Dear Sirs,—When your Michaelmas rent becomes due to me I hereby authorize and request you to pay to Messrs. H. & Co. 200*l.* to my credit, for which I will accept their receipt as so much of your rent discharged. W. Messrs. H. & T. (tenants)." W. committed an act of bankruptcy before any rent was due.

The M. R.: The real arrangement was a verbal one for the assignment of future rents. That is within the Statute of Frauds, which forbids parol evidence. The letter is only a request to the tenants to pay the banker's rents coming due at Michaelmas then next. This was *revocable*, and was revoked by the bankruptcy. It cannot be proved to be a valid equitable assignment, given for a valuable consideration, for the agreement is not in writing, and is therefore inadmissible in evidence.

I entirely agree with the decision in *Brice v. Bannister*, 47 L. J. R., Q. B. 722; L. R., 3 Q. B. Div. 569.

COMMENTS.

The expression of approval of *Brice v. Bannister* is important, inasmuch as Brett, L. J., there dissented from L.JJ. Bramwell and Cotton. The facts there were that G. contracted with the defendant to build him a ship to be paid for in instalments. G. was in difficulties, and applied to the defendant to advance him the price before completion, and this was done. Before the last 100*l.* of the price were advanced G. borrowed a similar sum from the plaintiff, and assigned to him the 100*l.* to become due from

the defendant by the following letter, *of which the defendant had notice before he paid G. the 100l.* :—"I do hereby order, authorize and request you to pay to B. [plaintiff] the sum of 100l. out of moneys due, or to become due from you to me; and his receipt for the same shall be a good discharge. J. G. To Mr. H. B. [defendant]."

Notwithstanding this notice, the defendant paid G. the 100l. It was held that the plaintiff was equitable assignee for value of the moneys payable under the contract by virtue of the Judicature Act, 1873, s. 25, sub-s. 6. In the case above noted, L. J. Bramwell pointed out that in *Brice v. Bannister*, there was no difficulty as to the Statute of Frauds. The result seems to be, as L. J. Bramwell said in *Brice v. Bannister*, that a man may make a contract with one man but have ultimately to reckon with another.

Does not this case illustrate the fact that the Judicature Act affects principles as well as procedure?

Walrond v. Rosslyn, Walrond v. Fulford.

[48 L. J. R., Ch. 602; L. R., 11 Ch. Div. 640.]

A jointress under an ordinary settlement of freeholds in the form of jointure with legal rent-charge and portions can require the proceeds of sale of the settled estate to be re-invested in land. Her bargain is to have land—to have a rent-charge on a freehold estate. That is a bargain which the Court will enforce. She is entitled to a real security instead of one in consols.

Re Adam's Trusts.

[48 L. J. R., Ch. 613; L. R., 12 Ch. Div. 634.]

Ordinarily speaking a trustee who compounds with his creditors or liquidates his affairs by arrangement will be removed from office. Bankruptcy *per se* is no evidence of crime or misconduct, but I agree that "misfortune is very often another name for imprudence."

In re The Gold Company, Limited.

[48 L. J. R., Ch. App. 650; L. R., 12 Ch. Div. 77.]

The M. R. : This is an appeal from an order made at the instance of a contributory and in the matter of a voluntary winding-up, under sect. 115. It is made to fix directors with liabilities, and directs the examination of certain persons as witnesses. A witness so summoned has no *locus standi* to apply to the Court to discharge the order. The only distinction is, that in ordinary proceedings the litigant summons witnesses, while in windings-up the Court does so. A *liquidator* is *dominus litis*, and does not file any affidavit before applying for subpoenas, &c., while a contributory has to give notice to the liquidator, under the 165th section, and to satisfy the Court as evidence that the liquidator ought to be put in motion, or that the contributory himself is entitled to the inquiry. The intention of the section is to assimilate the practice to bankruptcy, the liquidator representing the trustee and the contributory a creditor.

Re The Orrell Colliery, &c. Company; Holt's Claim.

[48 L. J. R., Ch. 655; L. R., 12 Ch. Div. 681.]

The dismissal for want of prosecution of an action brought against a company does not bar a claim in respect of the same matter in the winding-up of the company.

The M. R. : It is desirable that there should be a rule on this subject. The old practice enabled a man to abandon his action either at common law or in Chancery. As to the former, the defendant signed judgment of *non pros.*, and as to the latter, the bill was dismissed for want of prosecution, but by neither was the plaintiff prevented from bringing a new action for the same matter.

Sweetapple v. Horlock.

[48 L. J. R., Ch. 660; L. R., 11 Ch. Div. 745.]

The question arose upon a covenant in a marriage settlement thus: "In case the said E. H. now is, or if at any time during the continuance of her said intended coverture she, the said E. H. or the said T. S., in her right shall by transmission, &c., become seised of or entitled to any real or personal property . . . whatsoever, not being the premises . . . hereinbefore settled by her the said E. H.," then they were to settle same upon the trusts of the settlement, "with all convenient speed, after such interest of the said E. H. . . . shall fall into possession." Here E. H., at the date of the settlement, was, under her father's marriage settlement, in default of appointment by him, entitled to one-half of the property comprised therein. The power of appointment was confined to the children or remoter issue of the marriage. E. H.'s mother died long before E. H. married, and E. H. and one brother were the only issue of the marriage. Her father was still alive.

At the date of the settlement, therefore, E. H. certainly was entitled to a defeasible reversionary interest in real property. [The M. R., in *In re Jackson's Will*, *infra*, corrected the word contingent, occurring in the report, to *defeasible*.] Reversionary property was clearly contemplated, as the direction is of what is to be done with an interest which "shall fall into possession." The husband (T. S.) died first, and then the father appointed to his two children equally. Thus she got what she would have taken in default. If the property is comprised in this covenant it must be under the words "now is," for the appointment was not executed until after the coverture. If immediately after the date of the settlement she had conveyed all her interest under it, would that conveyance have passed that which came to her afterwards under the appointment? Apart from authorities, I should say it would not. A conveyance by an innocent assurance being subject to be defeated by the exercise of a power does not convey an interest afterwards taken under

that power. I am rather embarrassed by the authorities however.

(1.) *Re Froud's Settlement*, 10 L. T., N. S. 367; 4 N. R. 54. The V.-C. Wood there distinguishes the case (one affecting personalty) from one relating to real estate. I may avail myself of this, to say that it does not bind me as to real estate; but I should not follow it as to personalty. The appointment there did not change the interest of the appointee in point of amount, but it did change her interest as an object of the settlement.

(2.) *In re Visard's Trusts*, 35 L. J. R., Ch. App. 460, 804; L. R., 1 Eq. 667, and 1 Ch. 588. There the L. J. decided on the ground that the appointment altered the *quantum* of interest, but he appears to doubt whether an appointment of the same amount as would have been taken in default of appointment would not also have been *a new interest*. But if the share appointed is something more or less than the share in default of appointment and yet will pass as a new interest, why will it not pass as such new interest if it is the same in amount? It is a distinction without a difference.

(3.) *De Serre v. Clarke* (43 L. J. R., Ch. 821; L. R., 18 Eq. 587 (V.-C. Malins)). I cannot approve.

I decide that the share is not bound by the covenant. [See *In re Jackson's Will*, *post*.]

In re Bentham Mills Spinning Company (Limited).

[48 L. J. R., Ch. App. 671; L. R., 7 Ch. Div. 900.]

Article 10, Table A., Appendix to the Companies' Act, 1862, empowers a company to decline to register any transfer of shares made by a member who is indebted to the company. This applies only to a transfer by deed and not to devolution by law or, *in invitum*, by bankruptcy.

The word "transmission" in Table A. is put in contradistinction to the word "transfer." Under the title "Transfer of Shares" is a different set of rules to those found under

“Transmission of Shares.” Therefore, the trustee of a bankrupt-holder must be registered although the bankrupt may be indebted to the company.

Mullins v. Howell.

[48 L. J. R., Ch. 679; L. R., 11 Ch. Div. 763.]

The Court has power to discharge an interlocutory order made by consent under a proved mistake on the part of one side only. There is a sort of general control over interlocutory orders. The Court has also a discretion as to enforcing an undertaking by attachment of the person breaking it.

Re Smith, Ex parte Bright.

[48 L. J. R., Bank., App. 81; L. R., 10 Ch. Div. 566.]

The M.R. : The question is whether certain goods were in the order and disposition of the bankrupts. The true relationship subsisting between the bankrupts and the claimants of the goods was not that of vendor and purchaser, but that of principal and agent. [The claimants, manufacturers, consigned their goods to the bankrupts for sale by them on commission and *del credere* agency. The bankrupts acted under similar agency for other manufacturers, and described themselves on their business premises and in their invoices as “merchants and manufacturers’ agents.”] The principal may remunerate an agent by commission varying with profits, and, *a fortiori*, by commission depending upon the surplus obtained over the price which satisfies the principal. The amount of commission does not convert the agent into a purchaser. If a groom was sent with a horse to a fair to sell it for 80%, and his master said to him, “Whatever you get over 80% you shall have for yourself,” would that make the groom the purchaser of the horse? Again, the *guarantee* involved in a *del credere* agency excludes the notion of *purchase*. The bankrupts

would not guarantee payment by themselves. The bankrupts never held themselves out as the real owners. The ostensible and notified business was one of pure agency.

Ex parte **The Postmaster General, In re Bonham and M'Donnell.**

[48 L. J. R., Bank., App. 84 ; L. R., 10 Ch. Div. 595.]

The M. R. : In order to bind the Crown by an Act of Parliament the general rules are these:—Where the Act is for the public good, the advancement of religion and justice, and to prevent wrong, the Crown is bound by such Act, although not therein named. Where the Act is general, and thereby any prerogative, right, title, or interest is divested or taken from the king, in such case he is not bound unless expressly named. As to the Bankruptcy Act the latter rule applies, and the Crown is only bound by those sections in which it is named.

Powell v. Head.

[48 L. J. R., Ch. 731 ; L. R., 12 Ch. Div. 686.]

The plaintiffs and L. were the duly-registered proprietors of, and were entitled in equal moieties to, the copyright in an opera. Without the consent of the plaintiffs L. granted the defendant a licence to represent the same.

The M. R. : The analogy of the ordinary law, either in reference to incorporeal hereditaments or to choses in action, where actual possession of the tenement or thing held in common could not be had, is in favour of the plaintiffs, although the doctrines of the common law as to the rights of tenants in common are antiquated and barbarous. When the right to an advowson passed to co-parceners, it was not enjoyed by one to the exclusion of the other, but each presented in turn. Where a manor descended to co-heiresses the courts were

held in turn, and the profits of fairs, markets, and franchises were divided. As to choses in action, debts, and similar interests, tenants in common could only give receipts for their own shares. Copyright is an incorporeal thing. In the case of books it is a right to multiply copies, and in the case of dramatic copyright it is a right to permit the performance of a play, or opera, or whatever it may be. So that if driven to common law analogies, I should prefer the more rational analogy, and that most applicable to the subject-matter in question. I am not driven to that analogy, however, for it has long been settled that part-owners have a right to claim against each other. That was an extension, as to realty, of the right to an account under 4 Anne, c. 16. As to personality, and especially as to ships, equity thereby broke in upon the inconvenient common law rules, and, by appointment of a receiver or manager, or otherwise, secured for the various part-owners their several shares.

The statute gives the sole right of representation to the "author" or his "assignee," the singular being made to include the plural. Now it is against the very essence of part-ownership or co-ownership that when there is a tenancy in common, one of the two can dispose of the right of the other, there being no partnership or other form of agency.

Independently of the statute (5 & 6 Vict. c. 45) then, the licence of one tenant in common to represent the piece would not do. But sect. 2 of that Act makes this plain, as "author or proprietor" means authors and proprietors. See sect. 4.

COMMENTS.

The old common law rules, for the sake of carrying fictions to a sort of logical conclusion, and revelling in the difficulties thereby caused, in too many cases still exist. The rules applicable to tenancy in common are, as the M. R. observes, surely sufficiently in point as to this. *Jacobs v. Seward* (41 L. J. R., N. S., C. P. 221; L. R., 5 E. & I., App. 464) is strongly an instance, the substance of the decision being that one tenant in common cannot maintain trespass or trover against his co-tenant for carrying away the grass from their land. In these days no complainant ought to fail from mere defect in form of action, if he

sufficiently directs attention to a clear injury, and proves it. The terms "antiquated and barbarous" have, for instance, been often applied by judges to the state of the law as to slander, especially slander of women, and the absurdities as to necessary proof of "special damage," &c. Yet the law remains "barbarous" in this respect. Then as to injuries by ferocious animals. As to injuries to cattle and sheep by dogs no *scienter* need now be proved (28 & 29 Vict. c. 60). Yet as to injuries to human kind it *must* still be proved! Is not *this* "barbarous?" Such are some of the results of piecemeal legislation!

Leeming v. Lady Murray.

[48 L. J. R., Ch. 737; L. R., 13 Ch. Div. 115.]

Sect. 27 of the Bankruptcy Act, 1869, gives the trustee power to compromise matters arising in the bankruptcy with the consent of the committee of inspection. The question is whether a trustee who has brought an action relative to the bankrupt's estate may compromise it *without* the consent of the committee. The power conferred by sect. 27 is, when exercised, to bind *creditors* only. Sects. 17 & 83 enable the trustee to sue in his own name or in his official name. The former right is an additional right conferred by the law. He may so sue without consent of the committee. If he has power to bring actions he has the powers of an ordinary litigant, and, amongst them, the right to compromise. A guardian or committee may consent by order of Court. He would be *dominus litis*. So, by analogy, is a trustee in bankruptcy. He is the agent of the creditors.

COMMENT.

See now, 46 & 47 Vict. c. 52, s. 57, sub-s. 7 and s. 83.

In re Pinedi's Settlement Trusts.

[48 L. J. R., Ch. 741; L. R., 12 Ch. Div. 667.]

By an ante-nuptial settlement power was reserved to the wife, in events which happened, to dispose of the trust fund

"upon such trusts and for such person or persons as, notwithstanding coverture, she should by will appoint;" and, in default of appointment, the moneys were to be held upon trust for two (named) persons.

Shortly after the marriage she made her will, whereby, after reciting the settlement and the power therein contained, she, "in execution of the said power so reserved as aforesaid," after giving legacies in money and directing that her funeral and testamentary expenses should be paid by her trustees out of her trust property, bequeathed all the residue of her personal estate whatsoever to a person who died in her lifetime, a lapse of such bequest being thereby caused. She appointed executors of her will. Her husband took out letters of administration *de bonis non*, and claimed the residue as her administrator. The persons entitled in default of appointment also claimed the fund.

The M. R.: This is really a question of intention. Did the testatrix intend to dispose of the property as part of her personalty, including in that disposition the effect of the Wills Act upon the doctrine of lapse?

"The question is . . . whether the donee of the power meant by the exercise of it to take the property dealt with out of the instrument containing the power for all purposes, or only for the limited purpose of giving effect to the particular disposition expressed?" (*De Lusi's Trusts*, Ir. L. R., 3 Ch. Div. 232).

I have no doubt she intended the former. "The residue of my personal estate" includes the residue of the trust fund, and also what is subject to the power. The husband is entitled as her administrator. She meant to deal with the property as "one mass."

COMMENT.

Approved by Fry, J., in *Re Osborne*, L. R., 22 Ch. Div. 238; 52 L. J., Ch. 331. The M. R. said he could not understand *Hoare v. Osborne*, 33 L. J. R., Ch. 586.

***In re* The Second Commercial Benefit Building
Society (Limited).**

[48 L. J. R., Ch. 753.]

This was a shareholder's petition to wind up a company not registered under the Companies Acts. Although there may be no other method of winding-up the company, the Court may, in its discretion, refuse the order.

The Winding-up Acts were passed to wind up companies where the shareholders are so numerous that the winding-up cannot be effectively carried out by a suit. This petition seems to me unnecessary. No one supports it. A holder of twelve shares opposes—there are only nine holders in all, holding twenty-six shares; and if I were to make the order there would probably be nothing left for shareholders. In large concerns windings-up are beneficial, but in small ones ruinous. There are two modes in which this shareholder can be paid—(1.) Under voluntary winding-up pursuant to the rules; (2.) By action for the amount due.

Townsend v. Haworth.

[48 L. J. R., Ch. 770 (with *Sykes v. Howarth*)].

The claim in a patent was for the peculiar use of a combination of certain chemical compounds to preserve cloth from mildew. An agreement was made by the defendant to sell similar compounds to one B., and to indemnify him from any litigation in respect of any infringement of the patent in consideration of B.'s purchasing from the defendant such quantities of the ingredients as he might require. The complaint was that the defendant was selling to B. the same ingredients, under this agreement.

Held that such sale was no infringement.

If both parties were aware that the patent was valid, the agreement would be invalid as against public policy. If the patent was invalid, or likely to be disputed, the agreement

was good; but the defendant did nothing to infringe the patent. A person cannot be sued as an infringer of a patent for simply selling any articles, organic or inorganic, produced by nature or by art, used as compounds in the patented article, although he so sells with the knowledge that the purchaser will make a similar compound with the articles. On appeal this decision was affirmed, the L.J.J. pointing out that to be infringing the defendant must be shown to be a party with the man who infringes, and to actually infringe.

COMMENT.

In *Sykes v. Howarth*, L. R., 12 Ch. Div. 826; 48 L. J. R., Ch. 769 (Fry, J.), the defendant was, by his agent, the actual infringer of a patented article which he was employed by the patentee (plaintiff) to make up for sale.

Johnson v. Crook.

[48 L. J. R., Ch. 777; L. R., 12 Ch. Div. 638.]

The M. R.: I have to decide whether the law allows me to give effect to the will as it stands. The lady gives many annuities, then she gives certain life interests in property, then she directs a sale after the expiration of the life interests, and then, the sale being directed of a considerable portion, she gives all the rest, residue and remainder of the moneys forming the proceeds of sale of the residuary estate, subject to certain legacies and annuities, to K. and G. equally as tenants in common, with a proviso that if K. should die "before he should have actually received" the whole of his share of the residue, and without leaving issue, then, whether the same should have become due and payable or not, his share, or so much thereof as he should not actually have received, should go over to G. K. died without issue, before receiving any part of his share, but having survived the testatrix.

"Actually received" means actually received. There is no statute or common law to prevent this plain meaning taking effect. It does not in the least affect alienation, because the clause only applies to what K. does not receive.

It is mere potentiality of alienation, before actual receipt. There is nothing more certain than actual receipt. What seems to have struck the judges is the possibility that receipt may have been prevented by fraud, accident, or mistake. If such could have been proved the Courts might have well said, "the testatrix meant non-receipt in the ordinary course of business." If you show something out of that course, it means what the legatee has received or ought in proper course to have received. [Equity considers that as done which ought to be done.] Here I have not to consider that because the testatrix has said, "whether due and payable or not," she has provided for the possibilities and made actual receipt in any event necessary. Uncertainty there is none; difficulty in ascertainment, none; and general policy, none.

The cases I now consider in order :—

(1.) *Hutcheon v. Mannington*, 1 Ves. jun. 366. In this case Lord Thurlow did not mean to lay down any rule of law, but he was simply construing the particular will there. That was a gift of a legacy by a man (whose will stated that his fortune was chiefly in East Indian securities) with a clause directing that "if the legatee should die before he or she may have received the legacy," it should go to the legatee's children, and the same as regarded the residuary legatee. Lord Thurlow held the words, "may have received" to be equivalent to "*de jure receivable*." He was unable to find from the will in question that the testator intended "actually received."

(2.) *Elwin v. Elwin*, 8 Ves. 547. Here Sir Wm. Grant incidentally qualifies and disputes Lord Thurlow's language, if intended to lay down any general proposition of law.

(3.) *Gaskell v. Harman*, 11 Ves. 489, where Lord Eldon says, also dealing with *Hutcheon v. Mannington*, that a testator may by showing a plain intention to that effect, decidedly prevent a legatee, pecuniary or residuary, from having the legacy or residue unless he lives to receive it in hard cash. Then he says, in effect, that the use which he made of the case before Thurlow is as an authority that if the words are

ambiguous you impute to the testator that he meant *receivable* in the sense of being entitled to receive, and not entitled to receive in the sense of actual receipt. He further says that *he* (having argued the case) still thought that the words in *Hutcheon v. Mannington* meant actual receipt.

(4.) *Law v. Thompson*, 4 Russ. 92 (Sir John Leach, 1827). There Sir John Leach held the words as equivalent to "receivable actually received, or ought to have been received," and repeats Lord Eldon's observations on the case before Lord Thurlow.

(5.) In *Re Arrowsmith's Trusts*, 29 L. J. R., Ch. 774; 30 L. J. R., Ch. 148; 2 De G., F. & J. 474. Here the word "receivable" was held equivalent to *de jure receivable*. *Turner, L. J., dub.*

(6.) *Martin v. Martin*, 35 L. J. R., Ch. 679; L. R., 2 Eq. 404 (V.-C. Wood). I disapprove entirely. I treat this decision as a mistake of the V.-C. when he says that the law prohibits a testator from enforcing this condition of actual receipt.

(7.) *Minors v. Battison*, 46 L. J. R., Ch. 2; L. R., 1 App. Cas. 428. Here the point did not directly arise, but the L. C.'s observations that the clause as to children receiving their share can only be regarded as a divesting clause, or must mean not before actually receiving it, but before becoming entitled to receive it, is difficult to understand. Lord O'Hagan's view there was evidently in favour of that for which I contend—that no law forbids the meaning being effectuated. Then Lord Selborne's judgment lends some countenance to an opposite contention, but I think he had not present to his mind the decisions on which I have commented. In any event these observations are only *obiter dicta*. Where a gift over is not quite clear, and is susceptible of two meanings, as the presumption of law is in favour of not divesting a gift unless there are clear words to take it away, you are to prefer the meaning which leads to the least inconsistency, or is the more convenient. But where the words are, as here, clear, effect can and must be given to them.

[See 1 *Roberts v. Youle*, 49 L. J. R., 744, V.-C. Hall.]

Sturges v. Bridgman.

[48 L. J. R., Ch. App. (affirming the M. R.) 785; L. R., 11 Ch. Div. 853.]

A confectioner had for more than twenty years, prior to 1873, used pestles and mortars on his premises, which caused noise and vibration over a yard, part of the adjoining premises. In 1873 the owner of such adjoining premises, a physician, built a consulting room in the yard, and then the noise and vibration became a serious nuisance to him, and he sought an injunction.

The M. R. : The noise is admittedly a nuisance, but defendant says that, under the statute, or by prescription, it is legalized. But until lately, that is until the consulting room was built, there was no nuisance. This being so the defence cannot prevail. J. Wightman, in *Webb v. Bird*, 30 L. J. R., C. P. 384; 31 L. J. R., C. P. 335; 10 C. B. R., N. S. 268, and 13 *ib.* 841 thus states the law : "The presumption of a grant from long-continued enjoyment only arises where the person against whom the right is claimed might have interrupted or prevented the exercise of the subject of the supposed grant."

Here that was impossible : the plaintiff could not go into defendant's premises to interrupt the noise, and while the waves of sound passed across the garden there was no nuisance.

The statute 2 & 3 Will. 4, c. 71, s. 2 (the real defence), does not apply, because I get rid of the claim by declining to presume a lost grant. Moreover, this could not be taken on the 2nd sect. independently of the grant, for the easements there mentioned are easements to be enjoyed or derived "upon, over, or from" the servient tenement, and must be actually enjoyed for twenty years. This noise is not properly so described. C. J. Erle, in *Webb v. Bird* (*sup.*), says that the "passage of air"—he means the passage of waves of air, or either—is not a right contemplated by this section. (In *Dalton v. Angus* (*sup.*) the correctness of this decision in *Webb v. Bird* as to the passage of wind or air was admitted, but the *dictum* that sect. 2 is confined to rights of way or water is

disapproved.) The defendant here *only* claims the right of setting the air in motion by something which he has on his own property.

If a man has a noisy business—*e. g.*, a blacksmith's—in the middle of a moor, there being no injury to the owner of the rest of the moor, such owner could not interrupt the business. But if the moor were so built upon as that the noise became a nuisance to the occupiers of houses on it, a wrong, and a remedy, will arise. It was neither physically nor legally possible to interfere with the business before the actual nuisance arose.

As to presuming a grant, you must have regard to the circumstances. If a man has openly fouled a bright trout stream for many years by pouring the refuse of his manufactory into it, his neighbours not having complained, it may be right to presume that he is, by virtue of some terms with those neighbours long since arranged, or presumed to have been arranged, entitled by long user so to do. But the making a noise which for many years has not interfered with my comfort cannot give the person making it the right to continue it when, under altered circumstances, it does so interfere. Injunction granted.

The L.JJ. : The order of the M. R. is right.

Henty v. Schroder.

[48 L. J. R., Ch. 792; L. R., 12 Ch. Div. 666.]

A purchaser of real estate (defendant in the action) was unable to complete. The plaintiffs moved that the contract might be rescinded, and that the defendant might be ordered to pay damages.

The M. R. : The Court cannot rescind an agreement and at the same time give damages for its breach. I decline to follow (1) *Foligno v. Martin*, 22 L. J. R., Ch. 502; 16 Beav. 586; (2) *Sweet v. Meredith*, 32 L. J. R., Ch. 147; 4 Giff.

207: (3) *Watson v. Cox*, 42 L. J. R., Ch. 279; L. R., 15 Eq. 219, and the order set out in Seton, 4th ed., p. 1329, I decline to make.

The only order I can make is to rescind the contract, and direct defendant to pay the costs of the action.

In re **Banister, Broad v. Munton.**

[48 L. J. R., Ch. App. 837; L. R., 12 Ch. Div. 131.]

The M. R.: In sales by the Court there should be perfect good faith towards the purchaser, perhaps even more than in a sale out of Court. Where a trustee or *cestui que trust* is under disability, the Court always requires the conditions to be settled by the conveyancing counsel of the Court. In one sense such counsel is the counsel of the Court, but he is really the counsel of the vendor.

The considerations which induce the Court to *rescind* are not identical with those which induce it to decline to enforce specific performance of a contract. There may not be sufficient to induce the Court to rescind, and yet enough to prevent enforcement. Here the purchaser says he bought under untrue representations. If this is so, and the real facts were known to the vendor, although only unintentionally concealed, the purchaser ought not to be required to complete. The complaints are that the condition is that the purchaser was to assume E. B.'s seisin in fee, and not to enquire as to any other title. The fact was that she was not so seised, and the vendor knew it. A purchaser cannot be asked to assume as a fact that which the vendor knows not to be so.

Berkeley v. The Standard Investment Company.

[49 L. J. R., Ch. App. 1; L. R., 13 Ch. Div. 97.]

A member of a company required to answer interrogatories is not entitled to payment of his costs before filing his answer.

The solicitor of the company should prepare the answer, and charge the costs of preparing it against the company.

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Re Rainforth, Gwynn v. Gwynn.

[49 L. J. R., Ch. App. 5.]

Specific repayments of special advances will not operate to revive a general statute-barred balance. To do this there must be a payment on general account.

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Fisher v. Keane.

[49 L. J. R., Ch. 11; L. R., 11 Ch. Div. 353.]

The committee of a club who have power to exclude or suspend members in certain events must act as behoves a quasi-judicial tribunal, at a meeting called on due notice to all concerned. The consequences of adverse decisions are so great that the utmost caution must be exercised.

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Walker v. The London Tramways Company.

[49 L. J. R., Ch. 23; L. R., 12 Ch. Div. 705.]

Sect. 50 of The Companies Act, 1862, gives the company power, subject to the conditions of its memorandum of association, to alter any of the regulations contained in the articles of association. No company can contract itself out of sect. 50 in this respect.

COMMENT.

Therefore it would appear that the indirect method of removing directors suggested in *Blackpool v. Hampson* (*ante*), must almost always be available.

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Drover v. Drover.

[49 L. J. R., Ch. App. (affirming the M. R.) 37; L. R., 13 Ch. Div. 242.]

The M. R. : The process of *a ne exeat regno* is only used because and where the debt is equitable only, and will only be

issued in cases like those in which a common law judge would have allowed it in the case of a legal debt. The 6th sect. of the Debtors Act, 1869, now applies. The practice is now regulated by the Judicature Act, by virtue of which and of the effect of the Debtors Act, 1869, a plaintiff must show that he is entitled to an order of arrest under the last Act. (Sect. 6.)

***In Re The Bolton Benefit Loan Society,
Coop v. Booth.***

[49 L. J. R., Ch. 39 ; L. R., 12 Ch. Div. 679.]

This was a loan society, formed under 3 & 4 Vict. c. 110. The number of members had from time to time fluctuated, sometimes exceeding seven and sometimes being less. At the time of this (creditor's) petition the number was less than seven. Held that no winding-up order could be made (sects. 199, 200, Companies Act, 1862), but the M. R. suggested that the petition might stand over, an action be commenced by one of the four members against the other three, in which action he might decree a dissolution and winding-up as in an ordinary partnership. This was done, and a receiver or liquidator was appointed in such action.

Woodgate v. Godfrey.

[49 L. J. R., Q. B., &c. (App.), 1 ; L. R., 4 Exch. Div. 59.]

A sheriff's officer seized a judgment debtor's goods at his house, under *fi. fa.*, and sold them to the debtor's father-in-law, giving a receipt as for same with an inventory written under it. The same day the purchaser (father-in-law) let the goods to the debtor, who kept possession until they were again seized in execution. Cockburn, C. J., and Pollock, B., held that the receipt did not require registration as a bill of sale. This affirmed on appeal.

The M. R. : The only difficulty arises from *Ex parte Cooper, Re Baum*, L. R., 10 Ch. Div. 313 (48 L. J. R.,

Bank. 40), but L. J. Thesiger has explained to us that the Court there thought there was no sale independently of the receipt, which therefore, in effect, operated as the assurance. That is not so here. Here there was a completed transaction, not depending, in any manner, for validity on the receipt.

Bramwell, L. J. : If the judges meant that a mere receipt without more could be held to be an assurance within sect. 7 of the Act, I cannot agree with them.

The 41 & 42 Vict. c. 31, s. 4, provides that a "bill of sale" shall include "bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase-moneys of goods, and *other assurances* of personal chattels," but the *receipt* intended must be of a nature to *operate as an assurance*, or otherwise will not be a bill of sale.

This was so decided by the Court of Appeal in *Marsden v. Meadows* (50 L. J., Q. B. 536; 7 Q. B. Div. 80), where the 1878 Act applied. Brett, L. J., said that the case (in which the facts were almost identical) was governed by the principles laid down in *Woodgate v. Godfrey* (*supra*).



Baker v. Sebright.

[49 L. J. R., Ch. 65; L. R., 13 Ch. Div. 179.]

A tenant for life, who is not impeachable for waste, may cut such ornamental timber as the Court would direct to be cut for preservation of the remainder. But, if application was made in time, the Court would direct the cutting to be under its own supervision, and would restrain the tenant for life from himself cutting. If he does cut, the proceeds of sale of properly-felled timber belong to him absolutely.



In re Jackson's Will.

[49 L. J. R., Ch. 82 ; L. R., 13 Ch. Div. 189.]

There was here a residuary gift of the interest of all other the testatrix's property to her daughter for life, and "should she outlive her aunts and her uncle T., the whole principal at her death to be divided amongst her children, if she has any, in such proportions as she shall think proper, and if she dies without leaving children, the whole to go at her death to her uncle and aunts, should any or either of them be living, in equal proportions, and to be solely at their disposal."

The daughter survived her aunts and uncle, and died without exercising the power of appointment, leaving one child her surviving, two having died before her death.

This only surviving daughter was married in 1854, and the marriage settlement contained a covenant that if at the time of the said marriage the intended wife should be or thereafter during the joint lives of herself and husband, she or he in her right should become beneficially entitled by descent, transmission, devise, appointment, gift, representation or otherwise, to any real or personal property, estate or effects of the value of 1,000*l.* sterling for any estate or interest whatsoever (with certain defined exceptions), the excess over 1,000*l.* should be brought into settlement.

The M. R.: The exercise of the power might have been by deed or by will. The power to appoint by deed, *inter vivos*, is more useful even than a power to appoint by will. The language is general, and there is no ground whatever for restricting it to a testamentary appointment. A clear gift to children, or anyone else, is not cut down by the words "without leaving," if it can mean "without having," and I think that this was an alternative gift to the children, in default of appointment. But it is not necessary to decide that, because there is a gift to the children, either directly, viz., to be divided amongst them in such proportions as the daughter thought proper; and if she did not think proper to divide it, then they take equally; or it is a gift by implication

to the children, in default of appointment, because the gift over could not take effect if there was a single surviving child, and there was such a child.

The share of the surviving daughter is included in the covenant. "Beneficially entitled" is opposed to "entitled in trust:" everything else is included. *M'Lachlan v. Taitt* (30 L. J. R., Ch. 276; 2 De G., F. & J. 449) was so decided owing to the particular context in that case. The phrase is not confined to an interest *in possession*.

This is a vested reversionary interest in personalty, subject to be defeated by the exercise of a power of appointment. The binding authority is *Re Mackenzie*, 36 L. J. R., Ch. App. 320; L. R., 2 Ch. 345.

In *Sweetapple v. Horlock* (*supra*) I, in effect, said that I considered the reversionary interest included under the words "now is." Every executory or contingent or defeasible interest would be comprised. If an absolute reversionary interest is comprised it cannot be taken out because an event which might defeat it may happen, but does not happen.

COMMENT.

It will be observed that the decision in *Sweetapple v. Horlock* was founded on the fact that there, by the exercise of the power, a new interest was held to have arisen, that new interest not having been within the scope of the covenant. As the M. R. says: "If the event *does* happen"—*i. e.*, if the appointment *is* made it may take the matter out of the covenant; "but if it does not, why should the fact of a possibility alter the effect of the covenant, which says any estate or interest whatsoever?"

Bunting v. Sargent.

[49 L. J. R., Ch. 109; L. R., 13 Ch. Div. 330.]

Lease in writing, but void under 9 Geo. 2, c. 26, not having been enrolled; rent reserved at 1s. a year, paid for some time, then an interval of twenty years without payment; then payment of some arrears, as arrears, within five years before action brought. The Statute of Limitations cannot be set

up by the defendants in possession. Under sect. 8 of that statute there are two periods mentioned when the right of the reversioner can first accrue—(1) if no rent is paid, then it accrues at the end of the first year or other period; (2) if rent is paid, then it accrues at the last time when any rent shall have been received. The plaintiff has only to prove a payment of rent within twenty years of the commencement of the action. It is contended that a tenant might pay no rent for twenty years, and in the twenty-first year might pay it, and then turn round and claim the fee. This was a lease for ninety-nine years with a covenant for perpetual renewal; for all substantial purposes equivalent to a grant in fee. The trust of the whole is for the purposes of a chapel for Dissenters, known as Independents, and is therefore for a charitable use. Not having been enrolled it is void, and the covenant for renewal is void, and the plaintiff must recover possession.

COMMENT.

The decision upon the above section of the Statute of Limitations must not be confused with those of the Appeal Court in *In re Alison, Johnson and Mounsay* (11 Ch. Div. 284), and *Sanders v. Sanders* (*post*), holding, that a title once acquired under the statute cannot be revived by an acknowledgment afterwards given. Of course the sections applicable, viz., sect. 8 as to the above case, and sects. 12 and 15 applicable to cases irrespectively of the existence of any tenancy are quite different.



In re **Turner and Skelton.**

[49 L. J. R., Ch. 114; L. R., 13 Ch. Div. 130.]

Where there is no special contract between the vendor and purchaser as to compensation, a purchaser may lose his right to compensation by doing certain acts which show an intention on his part to fulfil the contract, and to waive any claim in respect of misdescription. Dart's V. & P. 5th ed. p. 1077, where the way in which it is put is that if the purchaser knows of the variation when he contracted he gets no compensation, nor if he goes on with the contract after learning as

to the error. But he does not state that a purchaser will lose his right to compensation if he takes a conveyance of the property without knowing of the error. At p. 1225 he cites certain cases where a purchaser has been allowed compensation after conveyance, (1) on the ground that the rent had been mis-stated in the particulars; (2) on discovering that an outstanding term was longer than represented (*Cann v. Cann*, 3 Sim. 447, and *Horner v. Williams*, 1 Jones and Carey, 274).

The theory is, that a purchaser contracts to take compensation if there is any variation from the particulars. Why should he lose it by taking a conveyance? It is said that everything is supposed to be then settled. Why should that be an obstacle when the defect is afterwards discovered?

Bos v. Helsham, 36 L. J. R., Exch. 20; L. R., 2 Exch. 72, is correct.

Manson v. Thacker, 47 L. J. R., Ch. 312; L. R., 7 Ch. Div. 620, is incorrect. (V.-C. Malins also held similarly in *Allen v. Richardson*, L. R., 13 Ch. Div. 524; 49 L. J. R., Ch. 137.)

In *Jolliffe v. Baker*, 52 L. J. R., Q. B. 609, Williams, Cave, and Smith, JJ., examined the authorities, arriving at the following conclusions: (1) Compensation after conveyance was never granted except as ancillary to specific performance, i.e., a bill after conveyance *only to obtain compensation* would be dismissed. (2) None can be given after purchase-money paid and conveyance executed unless the errors in quantity or quality amount to a breach of some contract or representation contained in the conveyance itself, or unless some fraud or deceit has been practised on the purchaser. (3) This fraud or deceit must involve some base conduct and moral turpitude. (4) That "legal fraud" is an erroneous expression unless understood to mean fraud properly so called only.

They accordingly disagree with the M. R.'s above decision. It is submitted that it was unnecessary to do so, for in *Jolliffe v. Baker* the acreage was only stated as "three acres or thereabouts," the discrepancy of 2 r. 28 p. proved to exist being covered by these qualifying words. The insertion of these

was notice to the purchaser not to rely on the vendor's statement as to quantity, the former having facilities to measure for himself. In *Turner and Skelton* (*supra*), the description seems to have been positively as 6 a. 2 r. 10 p., whereas after conveyance it proved to be 5 a. 0 r. 7 p. There was an express contract for compensation, which was absent in *Jolliffe v. Baker*.

But the M. R. lays down the law independently of express contract. The Q. B. judges say that the jurisdiction is only exercised as ancillary to specific performance, but of course the request for compensation implies the *idea* of such performance *with proper compensation*. The procedure under the Vendor and Purchaser Act, 1874, is so expeditious and convenient that it is surely better to adopt that than to bring a separate action for compensation, involving probably some years' delay. The M. R.'s question "why should a purchaser lose a right to compensation by taking a conveyance?" remains, then, unanswered.

The *contract* is the foundation of and guide as to the rights of the parties, and *Gale v. Squire*, L. R., 5 Ch. Div. 625; 46 L. J. R., Ch. 672, is an authority that the conveyance is to follow the terms of the contract, and not to exclude rights given by it. With deference, it is suggested that *Wilde v. Gibson*, 1 H. L. C., 605, is not in support of V.-C. Malins's decisions, for in that case the application was *to set aside* the conveyance, while an application for compensation involves, as already said, adherence to the contract on the fair term of compensation being made. With regard to the observations of the Q. B. judges as to "legal fraud," see *Reese River Silver Mining Co. v. Smith*, L. R., 4 E. & J., App. 79, where Lord Cairns says, "If persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue, they must be held as responsible as if they had asserted that which they knew to be untrue." See also *Mathias v. Yells*, 46 L. T. R., N. S. 497; *Redgrave v. Hurd* (*post*), and *Brownlie v. Campbell*, 5 App. Cas. 925, which, as the M. R. says, he reads as approving Fry, L. J.'s judgment in *Hart v. Swaine*, L. R., 7 Ch. Div. 42; 47 L. J. R., Ch. 5, and its reasons. The Q. B. judges disagreed with the reasons.

May not *Jolliffe v. Baker* be supported on its own state of facts as above, but not as disapproving the M. R.'s and L. J.

Marris v. Ingram.

[49 L. J. R., Ch. 123; L. R., 13 Ch. Div. 338.]

The Debtors' Act, 1869, abolished imprisonment for debt in the case of an honest debtor, but was intended for the punishment of fraudulent or dishonest debtors. It is so far vindictive.

The Debtors' Act, 1878 (41 & 42 Vict. c. 54), was passed in consequence of a case which came before me, and of my suggestion to a member of the legislature, who procured the Act to be passed for the purpose of giving a judicial discretion, as to whether imprisonment should be ordered or not.

I disapprove of *Barrett v. Hammond*, 48 L. J. R., Ch. 249; L. R., 10 Ch. Div. 285, and shall not follow it.

In *In re Preston*, 52 L. J. R., Ch. App. 545, the present M. R. approved of his predecessor's decision as above, and held, with him, that the express enactment in sect. 4, subsect. 4 of the Debtors' Act, 1869, as to acts of solicitors there mentioned, and the fact that these were omitted from the substantive part of the Act, afforded strong evidence that such acts were considered of a criminal nature.

Fry's decisions? It is to be remembered that the equitable rules are now to prevail where there is a conflict.

Why should the execution of a conveyance release a right of which the purchaser was then ignorant? An express release only operates as to rights fairly understood and intended to be waived. Again, the condition as to compensation is inserted also, and mainly, to protect *vendors* from any oversight. Would a vendor be rightly deprived of the benefit of the clause in the case of an error discovered after conveyance? If there are the qualifying words "more or less" or "thereabouts," probably the discrepancy should be large to entitle either to compensation or to induce the Court to interfere. But that is an independent question.

Hedley v. Bates.

[49 L. J. R., Ch. 170 ; L. R., 13 Ch. Div. 420.]

Where a man who has committed a trespass says, "I have a right to trespass, although I do not intend to exercise that right," an injunction is issued (*Hert v. Gill*, 41 L. J. R., Ch. App. 761 ; L. R., 7 Ch. Div. 699).

The object of the Judicature Acts was to decide, if possible, all matters in dispute in one proceeding. This question as to sufficiency of a notice under the Land Drainage Act, 1861 (24 & 25 Vict. c. 133), is, I will assume for a moment, within the magisterial province ; but this Court can also decide it, and grant a prohibition if the Court considers the notice bad. If I have jurisdiction by prohibition to the magistrates it is certainly more "just and convenient" (sect. 25, Judicature Act, sub-sect. 8) to do the same thing by injunction *inter partes*. But I doubt the magisterial jurisdiction, as the notice directs service on the owner, and the question of ownership should not be decided by two magistrates.

COMMENTS.

In *The North London Rail. Co. v. The Great Northern Rail. Co.*, 52 L. J. R., Ch. App. 380, L. J. Brett refers to the above case as one about which there "has been much discussion, in which the M. R. himself has taken part, and one in which for once he does not appear to have expressed himself so as to make what he intended to say as clear as almost all his judgments are. *Hedley v. Bates* has been explained twice over—viz., in *Stannard v. The Vestry of St. Giles, Camberwell*, 51 L. J. R., Ch. 629 ; L. R., 20 Ch. Div. 190, and *The Great Western Rail. Co. v. The Waterford and Limerick Rail. Co.*, 50 L. J. R., Ch. 513 ; L. R., 17 Ch. Div. 493." See also observations of the M. R. in L. R., 20 Ch. Div. p. 197.

In *Stannard's* case (*supra*) the M. R., sitting as a member of the Appellate Court, certainly qualifies *Hedley v. Bates*, in which case he, however, points out that there was a manifest and admitted trespass. The question is whether there is any ground for the independent interference by the Court with the magisterial or other tribunal appointed by the legislature to try the question. If that tribunal decides wrongly there is an appeal. We must not grant an injunction unless on other grounds com-

pelled to decide the whole question. Otherwise an injunction would be sought in every case before the magistrates.

Hedley v. Bates can therefore only be supported (if at all) on similar facts.

In re D'Augibau, Andrews v. Andrews.

[49 L. J. R., Ch. 182, and (on appeal) 756; L. R., 15 Ch. Div. 228.]

An infant may exercise a power simply collateral, both as to real and personal estate.

A power simply collateral I understand to be a power given to a person who has no interest whatever in the property over which the power is given. A power collateral or in gross is one given to a person who has an interest in the property over which the power exists, but such an interest as cannot be affected by the exercise of the power. The most familiar instance is that of a tenant for life with power of appointment to operate after his death. The third kind of power is a power with interest, *i. e.*, exercisable by a person having an interest in the property which is its subject, such interest being capable of being affected by such exercise. That is generally called a power appendant or appurtenant.

A power simply collateral can, it is settled, be exercised by an infant (Sugd. Powers, 8th ed., p. 911). The principle is difficult to understand, for the exercise of a power requires as much discretion as the disposal of property. But the law is so settled. If there is any reason it is that it requires more discretion to dispose of our own property than to dispose of other people's.

Independently of any express intention shown, it seems to me that an infant can also exercise a power collateral or in gross, both over real and personal property. There is no substantial distinction between the first two classes of powers, but a wide distinction between them and the third class. It may well be said that an infant cannot exercise the third sort (powers with interest), and so do, through the medium

of a power, what he cannot do directly. Here, I think, there is also express intention shown that the infant might thus exercise the power.

The L.JJ. upheld the decision. The power was a pure mandate, not dealing with the infant's property but with that of the settlor. L.J. James cited 1 Prest. Abst. 326, as also showing that an infant can exercise a power coupled with an interest if his infancy be dispensed with by the terms of the power, or if it was evident that it was so intended by the donor of the power. The L. J. Brett thought that by authority (*Hearle v. Greenbank*, 3 Atk. 695, one of those artificial rules which have brought disgrace upon our administration) they were prevented from holding that the power if it had been over real estate could have been exercised by an infant, although he agreed with the M. R. as to that.

COMMENT.

Surely the exhaustive statements of the law above contained should suffice to convince that the law, as to powers exercisable over real estate, should be assimilated to that applicable to those over personalty.

***In re* The City and County Investment Banking
Company (Limited).**

[49 L. J. R., Ch. App. 195; L. R., 13 Ch. Div. 475.]

Where a company in voluntary liquidation enters into an arrangement, under sect. 161 of The Companies Act, 1862, for the transfer of its business and assets to another company, the transaction, although it may be *ultra vires*, cannot be impeached by creditors after the expiration of the twelve months limited by the section.

Re Mercer and Moore's Contract.

[49 L. J. R., Ch. (App.) 201.]

The deeds relating to freehold land which was subject to a perpetual rentcharge and to building covenants, were deposited by way of equitable mortgage. After such deposit the mortgagor became bankrupt. The trustee in bankruptcy disclaimed the property under sect. 23 of the Bankruptcy Act, 1869. After the disclaimer, but pending the bankruptcy, the deposittee applied to the trustee and to the bankrupt to convey to him the legal estate, the deposittee agreeing to take the land in satisfaction of the debt. This was done, and the trustee and the bankrupt, "each according only to his estate and interest (if any) in the premises," granted and confirmed the land to the equitable mortgagee subject to the payment of the rentcharge and performance of the covenants.

The M. R. : Sect. 23, which contains the words, "land of any tenure," undoubtedly applies to freeholds. The disclaimer absolutely got rid of the property. The words of the subsequent conveyance show that it was doubted whether the trustee and bankrupt had got anything. Even if the conveyance had been contemporaneous it would not in this form have controlled the disclaimer. I am puzzled as to what is to happen, in the case of freeholds, if a trustee disclaims. The section provides for this as to a contract, a lease or shares in a company. Then, if it is "any other property," it is to "revert to the person entitled on the determination of the estate or interest of the bankrupt; but if there shall be no person in existence so entitled, then in no case shall any estate or interest therein remain in the bankrupt." As to this equity of redemption, coupled with the legal estate, perhaps it goes to the Crown. The Trustee Act provides no mode, as far as I can find, for getting in the legal estate.

COMMENT.

See 46 & 47 Vict., c. 52, s. 55.



Webb v. East.

[49 L. J. R., Q. B., &c., App. 250 ; L. R., 5 Exch. Div. 23, 108.]

Copies of letters written by a master in answer to inquiries as to the character of a servant, are not privileged from production on the mere allegation, unverified by affidavit, that they may tend to incriminate him. Whether if an affidavit to that effect were made, the privilege would be allowed, *qu.*:—The L.JJ. expressly guarded themselves against deciding that there would be such a privilege even then.

Swann v. Barber.

[49 L. J. R., Q. B., &c., App. 253 ; L. R., 5 Exch. Div. 132.]

The M. R., and Bramwell and Brett, L.JJ., here approved the principle enunciated by *Keith v. Burrows* (46 L. J. R., C. P. 452 and 801 ; L. R., 2 App. Cas. 636).

Emmins v. Bradford.

[49 L. J. R., Ch. 222 ; L. R., 13 Ch. Div. 493.]

If a settlor speaks of a woman who “dies without ever having been married,” he means a woman who dies without ever having had a husband. In *Clarke v. Colls* (9 H. L., Ch. 601) the words were “in case she had died intestate and unmarried,” and the question was as to the meaning of the word “unmarried.” It was said that might mean “without ever having been married,” or “not having a husband living at her death,” according to what the context required (Lord Cranworth’s judgment). So that he uses the very words used here as the proper English, showing one alternative as contrasted with the other, and to express the idea of the death of a woman who had never had a husband. Now, according to *Jenkins v. Hughes* (8 H. L., Ch. 571 ; 30 L. J. R., Ch. 870), one Court is not, on a question of construction, bound by the construction placed upon a similar instrument, even although the words therein may be identical, unless some principle of construction is laid down.

Therefore I am not bound by *Wilson v. Atkinson* (8 H. L. C. 571; 30 L. J. R., Ch. 870) if I disagreed with it, but I do not, as it was a mere case of construction aided by the special context of the document in that case. Unfortunately the report does not show what the context was, but the judges stated that it was improper to attach, in this case, the ordinary meaning, as above stated, to the words. The mere fact that the document was a marriage settlement would not be a sufficient context.

In *In re Ball's Trust* (48 L. J. R., Ch. 279; L. R., 11 Ch. Div. 270), and in *Upton v. Brown* (48 L. J. R., Ch. 756; L. R., 12 Ch. Div. 872), J. Fry, although in the first case stating his doubts as to the accuracy of the principle, thought that a principle of construction was laid down by *Wilson v. Atkinson* (*supra*). I do not think so, and consequently cannot follow these cases.

Nurse v. Durnford.

[49 L. J. R., Ch. 229; L. R., 13 Ch. Div. 764, and *Newbiggin-by-the-Sea Gas Co. v. Armstrong*, 49 L. J. R., Ch. App. 231; L. R., 13 Ch. Div. 764.]

When a solicitor has instituted an action without his client's authority, and the plaintiff applies against the solicitor for costs, notice of the application should be served on the defendant, and then the solicitor will be ordered to pay the costs of both plaintiff and defendant,—those of the plaintiff as between solicitor and client, and those of the defendant as between party and party.

The Fourth City Mutual Benefit Building Society v. Williams,—*Marson v. Cox*.

[49 L. J. R., Ch. 245; L. R., 14 Ch. Div. 140.]

The effect of a statutory receipt of a building society, under the Benefit Building Societies Act, 1874 (37 & 38 Vict. c. 42,

s. 42), for mortgage moneys is to vest the legal estate in the person who has the best right to call for it, and not to necessarily vest it in the person paying the money and taking the receipt. If a mortgagor who has created several equitable mortgages so discharges the debt, the first equitable mortgagee has the best and first claim to the legal estate, which vests in him accordingly.

The decision in *Pease v. Jackson* (37 L. J. R., Ch. 725 ; L. R., 3 Ch. 576), as I understand it, amounts to this. If a second mortgagee goes, with the assent of the mortgagor, to the first mortgagee and actually pays him money with the express contract to have the legal estate conveyed to him, he would have a better right to call for it in respect of the money so paid than would the man who paid nothing. I understand this was implied by the contract in that case. The judge relied on the intention of all the parties to the transaction that the arrangement was that the second mortgagees were to pay the money to the first mortgagee and get the legal estate, and that consequently the statute gave them the legal estate.

In re The Union Bank of Kingston-upon-Hull.

[49 L. J. R., Ch. 264 ; L. R., 13 Ch. Div. 808.]

Liquidators under a voluntary winding-up properly bring before the Court by motion, or by summons (*In re Whitehouse & Co.*, 47 L. J. R., Ch. 801 ; L. R., 9 Ch. Div. 595, 600), any question fairly arising in the winding-up. This power is conferred by sect. 138 of the Companies Act, 1862.

Any requisition or notice of dissent under sect. 161, referring to a special resolution to transfer or sell the company's business to another company must be in writing, and left at the office of the company not later than seven days after the date of the meeting at which the special resolution was passed.

Russell v. Russell.

[49 L. J. R., Ch. 268 ; L. R., 14 Ch. Div. 471.]

The M. R. here considered the cases in which, although articles of partnership contain a full arbitration clause, the Court should still, under sect. 11 of the Criminal Law Procedure Act, 1854, refuse to allow the matters to be decided by arbitration. The *dicta* of Wickens, V.-C., in *Willesford v. Watson* (42 L. J. R., Ch. 90 ; L. R., 14 Eq. 152), cannot, I think, be supported. Where personal fraud is in issue the Court may, at the instance of either, refuse to allow the reference to proceed. Where the party charged with the fraud desires a trial at law, he should have it. But where the person charging the fraud so desires that does not follow. It depends on the special circumstances of the case.

Carr v. The Metropolitan Board of Works.

[49 L. J. R., Ch. 272 ; L. R., 14 Ch. Div. 807.]

Under the Artizans' Dwellings Act, 1875 (38 & 39 Vict. c. 36), held that it was, by the combined effect of sects. 11 & 12, enough if an interest omitted by mistake from the provisional award framed under sched. cl. 8 is rectified before confirmation of the award under sect. 12 by two days' notice to claimant, who thereon appeared and entered into the case, and stated that although he protested against the jurisdiction he would not object if awarded enough. The award was made accordingly and compensation assessed to claimant, who afterwards sought to enjoin against entry on the land. Application refused. The claimant was a person "interested" within sect. 11.

In re The Metropolitan District Railway Company and Cosh.

[49 L. J. R., Ch. App. 277 ; L. R., 13 Ch. Div. 607.]

The M. R.: What are "superfluous lands" within The Lands Clauses Consolidation Act, 1845, s. 127? Any lands

not required for the purposes of the undertaking within the prescribed period, or a period of ten years, if no period be prescribed, are such. This case has been argued entirely under sect. 127. As to the power to sell land which may after the prescribed period become superfluous, I do not now decide. Nothing vests for want of sale within the ten years in the adjoining landowner when any part of the land is required at the expiration of the ten years for the purposes of the railway. The land which is comprised in sect. 127 is land properly so called, and not a mere easement of the land or a slice of the land taken horizontally, as distinguished from the ordinary use of the word land. Consequently if a railway company construct a tunnel by arching over a cutting and placing soil on the arch they cannot sell the surface soil over the tunnel as "superfluous land." Here the company tried to sell reserving all below, *i. e.*, the subsoil, and with a reservation of easements even over the manufactured soil placed above the tunnel.

Emmet v. Emmet.

[49 L. J. R., Ch. 295 ; L. R., 13 Ch. Div. 484.]

The M. R. : The ordinary rule as to the period for ascertaining a class where the distribution is postponed to a given age is a rule of convenience established against a testator's intention. The object of the rule is that at the period of distribution the class shall be clearly defined, so that the shares of the members of the class may be paid to them as they become absolutely vested. This rule is not to be applied unless absolutely necessary, and then in a manner to let in as many children as possible.

Berkeley v. Swinburne, 16 Sim. 275 ; 17 L. J. R., Ch. 416, recognizes the ordinary rule, but was decided on special grounds, three out of four of which do not apply here. It does not, therefore, establish the principle now contended for, that where a prior life interest is given it takes the case out of

the ordinary rule. It does not do so. Consequently in such a case all members of the class coming into existence before the eldest attains twenty-one are entitled, although there is a prior life interest which determines before any of the class attain twenty-one. The rule in *Gillman v. Daunt*, 3 K. & J. 48, applies.

COMMENT.

V.-C. Hall explained that in *Kevern v. Williams* (5 Sim. 172), queried by Hawkins (Const. Wills, p. 77), the part of the gift which was void for remoteness was severed from the good part of the gift.

—◆—

The Mayor of London v. Riggs.

[49 L. J. R., Ch. 297; L. R., 13 Ch. Div. 798.]

On a grant of land wholly surrounding a close retained by the grantor, the implied grant or re-grant of a right of way by the grantee to the grantor to enable him to get to the retained close, is not a grant of a general right of way, but only of one for the purpose of enjoyment of the retained close in its then state. It is to be a way of *necessity*, and not of *convenience*, and therefore must be limited as above.

COMMENT.

The implied re-grant is an exception from the rule that a man must not derogate from his own grant.

—◆—

(1) *In re Osborne and Rowlett.*

[49 L. J. R., Ch. 310; L. R., 13 Ch. Div. 774.] And

(2) *In re Morton and Hallett (App.).*

[49 L. J. R., Ch. 559; L. R., 15 Ch. Div. 143.]

(1) Devise and bequest of all real and personal estate to a wife for life, and after her death "to T. O. and R. S., their heirs, executors, and administrators, upon trust to sell the same at such times and in such manner as they, the said trustees, should deem expedient."

T. O., the survivor of the two, devised his trust estates to

J. O. and W. O. The widow being dead, T. O. and W. O. contracted to sell to R.

The M. R. : The expression, "the said trustees," means the persons who take the estate in accordance with the limitations of the will. If you adopt the literal meaning, "their" heirs must mean the heirs of both, not a single heir. The notion of confidence in the problematical heir of the survivor is not rational. The testator could not tell whether such heir would be a man, a woman, a child, or a lunatic; he could not even guess. Nor did the testator intend the trust to end on the death of the survivor of the two named trustees, for there is a prior life estate to the wife, and the trust for sale does not arise until after her death. If both trustees died in the lifetime of the tenant for life, the trust could not take effect at all, if held to end with the death of the survivor. That would be a remarkable intention to impute to the testator.

The true view is that the person to execute the trust for sale is the person who, according to the limitations in the will, takes the estate. The will should be read as if the devise had been in fee simple and the bequest absolute, so that on the death of the surviving trustee his heir would take, if he died intestate, or his devisee if he devised the estate held in trust.

The difficulty arises from *Cooke v. Crawford*, 11 L. J. R., Ch. 406; 13 Sim. 91 (V.-C. Shadwell). The case is distinguishable—(1) There is no previous life estate, so that survivorship for the necessary period for execution of the trusts might have been contemplated; (2) The gift there was not to "trustees upon trust to sell," but "upon trust that they, the survivors or survivor of them, or the heirs of such survivor, should sell," so that it is possible to argue that the testator (however capriciously) intended that only the trustees and the heirs of the survivor should have power to sell.

The V.-C. held that the devisees of the survivor could not sell, because the heir of the survivor was named as trustee, and there could be no devise.

I dissent from that decision. Its ground was that it was

an improper and unlawful act for a trustee to devise the trust estate.

The principle of a previous decision alone binds, and a subsequent judge may consider the propriety of that principle. In *Titley v. Wolstenholme*, 13 L. J. R., Ch. 410; 7 Beav. 425, I think Lord Langdale would not have followed *Cooke v. Crauford*, had not his attention been too much directed to the use in the case before him of the word "assigns." His decision upon that word confines its meaning to "testamentary assigns," whereas it clearly includes assigns *inter vivos*.

So far as this case lays down a principle I consider it in conflict with *Cooke v. Crauford*, for in the one case it is said that it is a breach of trust for a surviving trustee to devise the trust estate, and in the other case it is said it is not. In *Macdonald v. Walker*, 14 Beav. 556, Lord Romilly expresses his substantial disagreement with *Cooke v. Crauford*.

Wilson v. Bennett (20 L. J. R., Ch. 279; 5 De G. & S. 475) was the case of a power, not a trust. V.-C. Parker proceeded on the ground that a trustee cannot devise the trust estate except in accordance with the title under which he holds. His observations, so far as they go, are opposed to the views of V.-C. Shadwell, as he points out that a trustee may devise the trust estate, but that his disposition must in effect be subject to the control of the Court if he thereby vests the legal estate in a person (*e. g.*, a lunatic, or a person beyond the jurisdiction of the Court) who ought not to hold it.

In *Hall v. May* (26 L. J. R., Ch. 791; 3 K. & J. 585), V.-C. Wood pronounces the real ground for the decision in *Cooke v. Crauford* to be "irrational;" in other words, that a surviving trustee may devise the estate to a proper and competent trustee. *Ashton v. Wood* (3 Sm. & G. 436) supports this view. In *Stevens v. Austen* (30 L. J. R., Q. B. 212; 3 E. & E. 685), *Cooke v. Crauford* was cited without disapproval; but that is the only case in which it was so cited. I do not see exactly what was decided in that case, as the judgments of two out of the three judges can be read in two

different ways, one being the way in which the case was considered by J. (now Lord) Blackburn. He says that he should wish time to consider whether *Cooke v. Crawford* was binding.

I am not bound by *Cooke v. Crawford*, and shall not follow it.

(2) In *Re Morton and Hallett*. The M. R.: Here real estate was devised to trustees and their heirs upon trust, that after the death of the tenant for life, "the said trustees or trustee, or the trustees for the time being" of the will should sell. Under a gift to A. and B. and their heirs upon trust to sell, the heir of the survivor can, of course, sell, there being no devise of the trust estate, and no severance of the legal estate from the heirship. The converse case—of a devise by the surviving trustee—has alone created a difficulty. As to that, I gave the above decision recently. The language of the power to appoint new trustees would not affect the question, although here, I think, its language treats the heirs as trustees.

The L.JJ. upheld the decision. L. J. James thought the language of the power to appoint new trustees somewhat favoured the contention that it might be controlled, but that the language of such a clause in general would not, and that this would not affect the question.

Baggallay, L. J., said that he would express no opinion as to the M. R.'s decision in *Osborne v. Rowlett*. At present he saw no reason to dissent from *Cooke v. Crawford*.



Askew v. Woodhead.

[49 L. J. R., Ch. App. 320 ; L. R., 14 Ch. Div. 27.]

Where leaseholds settled on a person for life with remainder over are purchased compulsorily by a corporation, under the Lands Clauses Consolidation Act, 1845, the life owner is, under sect. 74, entitled to have the fund in Court, whether the income from it is more or less than the net rental, applied so as to produce an annuity for the number of years the lease has to run.

Rigby v. Connol.

[49 L. J. R., Ch. 328; L. R., 14 Ch. Div. 482.]

The M. R.: The foundation of the Chancery jurisdiction to interfere with clubs or societies is the invasion of a right of property.

The Trades Unions Act, 1871 (34 & 35 Vict. c. 31), was passed primarily to prevent robberies from such societies by their officers. Some of such officers had previously availed themselves of the illegality of such unions to cover their frauds. Another object was to enable unions to sue in respect of their property; to recover it from third persons; and to hold property, such as a house or office. It was not intended that contracts made by members *inter se* should be legalized.

This being an illegal society, I cannot grant the declaration asked for restoration to membership and participation in profits.

[Followed by Denman, J., in *Duke v. Littleboy*, 49 L. J. R., Ch. 802.]

Matthews v. Whittle.

[49 L. J. R., Ch. 359; L. R., 13 Ch. Div. 811.]

In a case subject to the provisions of the Married Women's Property Amendment Act, 1874 (37 & 38 Vict. c. 50), the statement of claim in an action against husband and wife need not state that the husband has received assets with the wife. The husband may claim the benefit of the provision by his pleading.

The Camberwell and South London Building Society v. Holloway.

[49 L. J. R., Ch. 361; L. R., 13 Ch. Div. 754.]

A "lease" is well granted by a freeholder, a copyholder with lord's licence, or a leaseholder. If, by the last, the instrument is called an under-lease or a derivative lease. It has been decided that where a man sells a lease for a defined

term of years, *simpliciter*, he does not make a good title to the lease, unless he shows that he holds direct from the freeholder, or, I suppose, a copyholder with lord's licence. That is all. If there is fair notice that it is an *underlease* which is being sold, that suffices.

Madeley v. Booth (2 De G. & S. 718) I entirely disapprove. The purchaser there got all he contracted for, with the advantage of not being liable to be sued upon the covenants in the lease. The supposed disadvantage, viz., that the head landlord would not be bound to accept an underlessee's tender of rent, is an absurdity. The judgment is one without reasons. I think these particulars disclosed that the purchaser was buying an under-lease. A "superior landlord" is mentioned, and the words "executors, administrators, and assigns" in the covenant for payment of rent show that there was not a superior landlord. Moreover the conditions fix the purchaser with notice of the lease. This is to be distinguished from cases where there is an untrue statement coupled with a reference to a document which would show the untruth. For there the purchaser may fairly rely on the untrue statement. But where there is only a statement, which is at the utmost *ambiguous*, coupled with such a reference, this does not apply.

In re **The Manchester and Milford Railway Company, *Ex parte* The Cambrian Railway Company.**

[49 L. J. R., Ch. App. 365; L. R., 14 Ch. Div. 645.]

The M. R. : The question is as to the true construction of sect. 4 of the 30 & 31 Vict. c. 127 (Railway Companies Act, 1867) which, for the first time, protected the rolling stock of a railway company from execution. The section, however, gives entirely new rights to the judgment creditor, for he may obtain the appointment of a receiver, and, "if it is

necessary," a manager. It is necessary where there is a business to be managed; and the official is to be appointed by, and under the control of, the Court. Generally the board of directors would be appointed, or their secretary, but the Court will supervise the proper application of the money.

COMMENT.

The judgment creditor has only to file an affidavit—(1) proving his debt; (2) that it is unpaid; (3) that the company is a going concern. A receiver would be appointed where the line is leased or under a working agreement (*ib.*).

The Alina.

[49 L. J. R., P. D. & M., App. 40; L. R., 5 P. D. 138.]

Under the Admiralty Jurisdiction Amendment Act, 1869, the county courts have jurisdiction in actions *in rem* for breach of a charter party if the damages claimed do not exceed 300*l.*, although the Admiralty Court has no original jurisdiction in such matters.

Gaudet v. Brown (42 L. J. R., Adm. 1; L. R., 5 P. C. 134) followed.

Simpson v. Blues (41 L. J. R., C. P. 121; L. R., 7 C. P. 290), *Gunnstead v. Price* (44 L. J. R., Exch. 44; L. R., 10 Exch. 65) overruled.

Blake v. Blake.

[49 L. J. R., Ch. 393; L. R., 15 Ch. Div. 481.]

A testator made his will, whereby, after reciting that a certain reversionary moiety of real estate was subject to his general appointment, he directed that the same should remain to the use of trustees and their heirs for a term of 500 years upon trusts therein declared, and subject thereto to the use of his son A. and his heirs, and subject and without prejudice to that appointment he gave all the residue of his real and personal estate, or of that over which he had a power of appointment, to his widow, B., absolutely. Under contracts

of sale, entered into a few months before the date of the will, with his written consent (as required by the terms of the power of sale), portions of the real estate were sold, and some agreed to be sold. Some remained unsold at testator's death. The son, A., already had the other moiety of the settled lands.

The M. R. : *Gale v. Gale* (21 Beav. 349) is in point. Lord St. Leonards (Powers, p. 308) says, that was a "narrow construction" of sect. 23 of the Wills Act. I do not agree in this. Sect. 23 refers to a *remaining interest*, and does not apply to "*cases where the thing meant to be given is gone*" (Shelf. 520). Lord St. Leonards points out, however, that in *Gale v. Gale* the testator intended the legatee to take the proceeds. That is not so here, this gift being of real estate as such. The character of the gift is changed by the act of the testator, and thereby, as to it, the will is revoked.

Ward v. Ward.

[49 L. J. R., Ch. 409; L. R., 14 Ch. Div. 714.]

An annuity given by ante-nuptial settlement "unto and to the use of the husband and wife during their joint lives," creates a life tenancy by entireties in the annuity, and renders it liable to the husband's debts.

COMMENT.

This will not be so, since the Married Women's Property Act, 1882, which seems to have the effect of destroying this "tenancy by entireties." The M. R. thought the above a "hard case on the lady."

Isaacs v. Fiddemann.

[49 L. J. R., Ch. 412.]

Books printed piratically before a proprietor has registered his copyright become his property after such registration.

Hole v. Bradbury (48 L. J. R., Ch. 673 (Fry, J.)); L. R., 12 Ch. Div. 886) disapproved, and not followed.

***In re Hallett's Estate—Knatchbull v. Hallett—
Cotterell v. Hallett.***

[49 L. J. R., Ch. App. 415; L. R., 13 Ch. Div. 696.]

The M. R.: *Whitecomb v. Jacob* (1 Salk. 161) was decided on the ground that equity could not follow money, as it had no ear-mark. But it is now settled that money may be ear-marked. Subsequent judges have followed the decision blindly. The reason for it is gone.

The modern doctrine of equity as to property disposed of by persons in a fiduciary position is clear and well-established. You can, if the sale was rightful, take the proceeds of the sale if you can identify them. If the sale was wrongful you can still take the proceeds of the sale, in a sense adopting the sale for the purpose of taking the proceeds if capable of identification. If you cannot identify the proceeds, because they have been invested in the purchase of land or chattels, the following are the rules:—If the purchase is made with trust-money, *i. e.*, money held as well on express as on all other trusts, the beneficial owner may elect either to take the property purchased or to hold it as a security for the trust-money laid out in the purchase. He may either take the property or have a charge on it. Where a trustee has mixed the trust-fund with his own money in the purchase, the *cestui que trust* has a charge on the property for the amount of the trust-fund expended in the purchase. The word "trustee" here used includes all persons whomsoever holding a fiduciary position, such as agents, bailees, collectors of rents, &c., &c. There is no foundation in principle for any confinement of the meaning to express trusteeship, for the beneficial ownership remains the same. I have referred to the "modern" rules, because the doctrines of equity are altered, improved, and refined from time to time. They are not supposed to have existed from time immemorial. For instance, as to the separate use, and its incidents, the restraint on alienation, the rule against perpetuities, or those as to equitable waste, we can name the Chancellors who invented them.

If a pure bailee sells the goods bailed the bailor can in equity follow the proceeds wherever they can be distin-

guished. Supposing the trust money was 1,000 sovereigns, and the trustee put them into a bag, and by mistake, accident, or otherwise, dropped a sovereign of his own in with them. The *cestui que trust* has in effect a charge of 1,000 sovereigns on the 1,001 sovereigns. If the fiduciary carried the money to his bankers you could follow it. If the money was lent without security you could follow the debt and get it from the debtor. If with security, you could take the note, bond, or security. If money of his own was mixed you take a *charge*, quoad the trust advance, on the security.

Ex parte Dale & Co., 48 L. J. R., Ch. 600 ; L. R., 11 Ch. Div. 772, is wrong, and we overrule it.

Whitecomb v. Jacob (*sup.*) is only good law quoad the decision there that the equity as to following the proceeds attaches to a factor. To *Ryall v. Rolle*, 1 Atk. 165, and to *Ex parte Dumas*, 1 Atk. 232, the same applies. The *dictum* of Willes, J., in *Scott v. Surman*, Willes, 400, is simply a citation of *Whitecomb v. Jacob* without consideration of the case. Lord Thurlow's observations in *Ex parte Sayers*, 5 Ves. 169, are subject to the same remarks. In *Taylor v. Plumer*, 3 M. & S. 562, Lord Ellenborough throws over all the prior decisions as to money not ear-marked not being followed. His judgment is correct up to the words stating that the means of ascertainment fail "when the subject is turned into money and mixed . . . in a general mass of the same description." That is wrong. Equity would follow the money by taking out the same quantity.

Pennell v. Deffell, 20 L. J. R., Ch. 115 ; 4 De G., M. & G. 372, enunciates the principle that a trustee cannot assert a title of his own to trust property, and that if a man mixes trust property with his own the whole will be treated as trust property, except so far as he may be able to distinguish it (*Frith v. Cartland*, 34 L. J. R., Ch. 301 ; 2 Hem. & M. 417). So far the case is correct. But if a trustee has 100 sovereigns in a bag and adds 100 of his own, and the next day he draws out 100, the 100 which remain will be treated as the trust fund. So as to drawings out from a bank at which the mixed fund is deposited. As to this *Pennell v. Deffell*

is incorrect, and we overrule it. The rule in *Clayton's case*. (1 Mer. 572) has no application as between trustee and *cestui que trust*.

[On the latter point Thesiger, L. J., dissented.]

COMMENT.

If, however, the trustee represents distinct *cestuis que trust*, and the several trust moneys have become mixed by payment in one sum or more to the trustee's banking account, the strict application of the rule in *Clayton's case* as between the different *cestuis que trust* may be correct (*ib.*).

Chandler v. Pocock.

[49 L. J. R., Ch. 442; L. R., 15 Ch. Div. 491; affirmed on appeal, L. R., 16 Ch. Div. 648.]

In the events which happened land stood limited by settlement to the use of such person or persons as A. B. should by will appoint. There was a power of sale contained in the settlement under which the lands might with A. B.'s consent be sold, the proceeds to be laid out in repurchase of other lands to be settled to the same uses, and in the meantime to be invested, and the income being paid to the same persons as would have been entitled to the rents of the purchased land if such purchase had then actually been made.

Under this power the land was sold with A. B.'s consent, and invested in consols, and so remained at A. B.'s death. By her will A. B. gave legacies amounting to 30,000*l.*, and bequeathed "all the residue of her personal estate and effects whatsoever" to C. D. and E. F. absolutely. Her own personalty (*i. e.*, irrespectively of that over which there was the power as above) did not exceed 6,000*l.*

Held that the consols passed to the residuary legatees.

The M. R.: All that the authorities have said is that where there are persons entitled to an intermediate interest who, after the death of the testator, have still a right to call for the investment of money in land, the money is in equity real estate of the testator, and a gift of "my real estate"

will pass it, but a gift of "my personal estate" will not. But here there is no interest in anyone else who at the moment of her death would be entitled to call for conversion. The interpretation clause in the Wills Act shows that "personal estate" includes government funds. When the two kinds of estates, personal and real, are spoken of, the period of death is *prima facie* that by which the character is to be ascertained.

COMMENT.

The inclusion implied by sect. 27 (Wills Act), of an exercise of a general power must not be taken as adding intensity of expression to the bequest. *In re Greave's Settlement*, L. R., 23 Ch. Div. 313 (Fry, J.).

Ball v. Kemp Welch.

[49 L. J. R., Ch. 519; L. R., 14 Ch. Div. 512.]

The costs of a partition action should be borne by the parties in proportion to their interests. I always follow *Cannon v. Johnson*, 40 L. J. R., Ch. 46; L. R., 11 Eq. 90.

***In re The Hull and County Bank, Limited;*
Burgess's Case.**

[49 L. J. R., Ch. 541; L. R., 15 Ch. Div. 507.]

If there are untrue statements in a prospectus a person contracting to take shares may apply to rescind the allotment within a reasonable time, and while the company is a "going concern." But the winding-up entirely alters the position of parties. Sect. 38 imposes new liabilities (*Webb v. Whiffin*, 42 L. J. R., Ch. 161; L. R., 5 E. & I., App. 711). *Oakes v. Turquand* (36 L. J. R., Ch. 949; L. R., 2 E. & I., App. 325), excludes this application.

In re Arthur's Estate: Arthur v. Wynne.

[49 L. J. R., Ch. 556; L. R., 14 Ch. Div. 603.]

A., on his marriage, in August, 1873, covenanted with the trustees of his marriage settlement that he would, on or before the 2nd July, 1875, insure his life in 10,000*l.*, and that the money when received should be held by the trustees

on trusts for the benefit of his wife and children. Up to a short time before July, 1875, A. continued in good health, as he had been when he covenanted as above, but he then fell ill, and he could not effect an insurance. On his death a claim for the 10,000*l.* was made against his estate.

The M. R. : The effect of the covenant is to create a debt. An absolute covenant cannot be cut down without reason. There were two years in which the covenant might have been performed. He cannot avail himself of negligence. I think the covenant was intended as one means of making a provision for the family. The covenantor must be taken to have had in his mind the contingency of health failing and the uncertainty of life, and it is known that some offices will take insurances on persons in failing health at higher rates.

***In re* An Arbitration between Davey, &c.**

[49 L. J. R., Ch. App. 568.]

An application to make a submission to arbitration a rule of Court should be made *ex parte* by summons.

***In re* Parker, Bentham v. Wilson.**

[49 L. J. R., Ch. 587 ; L. R., 15 Ch. Div. 528 ; affirmed on appeal, 50 L. J. R., Ch. 639 ; L. R., 17 Ch. Div. 262.]

The meaning of the words "first cousins" in a will is well understood to be "cousins german," or the children of an uncle or aunt. "Second cousins," *prima facie*, mean collateral relations in the second degree, *i. e.*, persons having the same great-grandfather or great-grandmother as the testator.

Mayott v. Mayott (2 Bro. C. C. 125) is, as reported, absurd, but the editor's note shows that by the context the testator had put upon the words "second cousins" some other meaning than that which is the natural meaning.

Silcox v. Bell (1 L. J. R., Ch. (O. S.) 137 ; 1 Sim. & S. 301), and *Charge v. Goodyer* (3 Russ. 140), are, in my opinion,

entirely wrong, and the judges were misled as to the effect of *Mayott v. Mayott*, and by the erroneous head-note to that case.

COMMENT.

But where, when the will is made, there are no "second cousins" properly so called, first cousins once removed are entitled under a bequest to "second cousins." *Re Bonner, Tucker v. Good*, 51 L. J. R., Ch. 83; 45 L. T. 370; Chitty, J., following *Slade v. Fooks*, 9 Sim. 386; 8 L. J. R., Ch. 41. The L. JJ. upheld the M. R.'s observations in every respect.

(1) **Ginesi v. Cooper**

[49 L. J. R., Ch. 601; L. R., 14 Ch. Div. 596];

(2) **Leggott v. Barrett**

[51 L. J. R., Ch. App. 90; L. R., 15 Ch. Div. 306]; and

(3) **Walker v. Mottram.**

[51 L. J. R., Ch. App. 108; L. R., 19 Ch. Div. 355.]

[One of the propositions laid down by the M. R. was overruled in *Leggott v. Barrett* (*supra*), but the appellate judges were as divided in opinion upon the right principle that it is better to give the substance of the judgments until the matter is set at rest in the H. L.]

(1) The M. R.: L. J. James has said that the command "Thou shalt not steal" is as much a portion of the law of courts of equity as of courts of law. It is gravely argued before me that a trader who has for value sold his business and its goodwill to another man is, notwithstanding, entitled to solicit his old customers to deal with him as if no sale had been made.

The exact contrary was decided in *Labouchere v. Lawson* (41 L. J. R., Ch. 427; L. R., 13 Eq. 322). That decides against the right of solicitation. I go further and say that the seller must not *deal with* the old customers. It is not, perhaps, necessary now to decide that, but I state that. The

sale is intended to include the whole benefit of the connection. If a solicitor sells his business, say at five years' purchase, could he, having had his offices on the first floor, immediately afterwards go to the ground floor, paint up his name, and there receive his old clients as usual, because they choose to come, even if he did not actually ask them to come? What is "good-will"? "It must mean every possible advantage, as contrasted with the negative advantage of the late partner not carrying on the business himself, that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the business" (V.-C. Wood, *Churton v. Douglas*, 28 L. J. R., Ch. 841; Johns. 174). Attracting customers to the business is a matter connected with carrying it on. The formation of the connection has made the value of the thing sold. *Crutwell v. Lye* (17 Ves. 335) was not a sale by a trader, but by the assignee of a trader in bankruptcy. There is the distinction that while the trader himself can sell both the property and the negative right as against himself, the assignee cannot do this, but can only sell the property. [He cannot control the bankrupt's personal acts in this respect.] That does not apply to the present case. Here, I think, there is a fraud on the contract on the part of these stone-merchants who, having received full value for the business and goodwill at Rotherhithe, St. Pancras, and King's Cross, within two years have recommenced business and solicited former customers. I restrain them from soliciting or in any way endeavouring to obtain the custom of or orders from old customers.

(2) *Leggott v. Barrett* (*supra*): In this case the M. R. made the same kind of order in the case of ironmongers. The defendant submitted as to the solicitation, but appealed as to the injunction against dealing with old members of the firm. L. J. James said that at first he had thought that the injunction might, on the equitable view of the case, be as

granted, but that he now thought it too vague and wide. He did not think that upon just principle it could be extended to prevent the supply of goods to a man who applied for them. A man might give an order without reference to previous solicitation. At law solicitation, in fact, seduction, from one to the other would have to be proved. L. J. Brett: This was a case of sale by one partner to another. If the goodwill had been sold to a stranger, *Labouchere v. Lawson* (*supra*) would have applied. Solicitation of old customers could not then have been allowed to immediately follow. Such "*customers are really the people who form the goodwill.*" So as to dissolution of partnership *for valuable consideration*. I think there the same doctrine would apply. The doctrine is that the sale of the goodwill implies the contract against solicitation of former customers; but this does not extend to unsolicited dealings. Cotton, L. J., gave judgment to the same effect.

(3) *Walker v. Mottram* (*supra*) (affirming the M. R.): L. JJ. Lush and Lindley: *Labouchere v. Lawson* was approved in *Leggott v. Barrett*, although its extension, as in *Ginesi v. Cooper*, was disapproved. We agree with it. At the same time the case went beyond previous authority. At any rate it cannot be extended to the case of a compulsory sale in bankruptcy. A bankrupt who has obtained his discharge cannot be enjoined against solicitation of old customers. The obligation is a purely personal one. L. J. Baggallay said he doubted the decision in *Labouchere v. Lawson*.

COMMENTS.

The result of the cases seems to be:—

- (1) That the sale of a goodwill to a stranger, or to a continuing partner for value, implies a contract not to solicit old customers.
- (2) That this does not apply to a sale by a trustee in bankruptcy.
- (3) That there is not on a sale of goodwill any implied contract not to deal with the old customers, where the dealing cannot be traced to solicitation.

At the same time is not the view of the M. R., expressed in *Ginesi v. Cooper*, the more equitable view? Such a restriction

as he would have imposed would not operate in general restraint of trade, for the vendor might begin business of a different kind. Why should the onus of proving the act of solicitation be on the purchaser of the goodwill? Is not that requirement akin to the onus on a plaintiff in certain cases at law (*i. e.*, of slander) to prove "*special damage*." There is the wrong, and there is the damage, but a plaintiff is to prove "*special*" damage. It is either a breach of an implied contract in the one case and a legal wrong (because a SLANDER) in the other, or it is not. If it is, why should any onus of proof be on the plaintiff? This is too much like the principle adopted against creditors and in favour of debtors, under the Debtors Act, &c. A creditor is punished for trusting his debtor; for the creditor must now *prove means* before he can even take out a judgment summons.

The real consideration in cases like the above seems to be, "Does not the vendor of the goodwill of his business impliedly represent that he will absolutely retire from that character of business in favour of the vendee?" Observe L. J. Brett's expression that "the customers form the goodwill." Surely this strongly confirms the M. R.

In the present state of the authorities vendees should always take a contract in terms against dealing with the old customers or continuing the same kind of business within a specified area.

In re **Richardson, Richardson v. Richardson.**

[49 L. J. R., Ch. 612; L. R., 14 Ch. Div. 611.]

A creditor who obtains the conduct of an administration action, although not the original plaintiff, is equally with a creditor plaintiff, entitled to his costs of action as between solicitor and client.

In re Burrell, Burrell v. Smith, 39 L. J. R., Ch. 544; L. R., 9 Eq. 443, disapproved (V.-C. James).

Thomas v. Jones, 29 L. J. R., Ch. 570; 1 Dr. & S. 134, approved (V.-C. Kindersley).

In re **Whiting and Loomes.**

[49 L. J. R., Ch. 617; L. R., 14 Ch. Div. 822; affirmed
50 L. J. R., Ch. 472; L. R., 17 Ch. Div. 10.]

A mortgage by demise of leaseholds made in 1879 was insufficiently stamped. The mortgagor afterwards agreed to sell the leaseholds, and it was arranged that the mortgagees should be paid off out of the purchase-money, and join in the assignment to the purchaser.

Held that the purchaser was, notwithstanding, entitled to have the deed properly stamped.

The M. R.: The deed may be the purchaser's protection against a vendor's mesne incumbrance.

COMMENT.

See *Re Birkbeck Land Society*, 52 L. J., Ch. 777 (Pearson, J.).

If the mortgage has not been acted upon and cannot be a protection, *semble* that concurrence in the assurance would obviate the necessity to stamp.

In re **Spradbury's Mortgage**

[49 L. J. R., Ch. 623; L. R., 14 Ch. Div. 514]; and

In re **Brook's Mortgage.**

[25 W. R. 841.]

The 4th section of The Vendor and Purchaser Act, 1874, did not apply to the transfer of a mortgage.

[The section is now repealed and enlarged by sect. 30 of The Conveyancing Act, 1882.]

Slade v. Tucker.

[49 L. J. R., Ch. 644; L. R., 14 Ch. Div. 824.]

The doctrine of privileged communication does not extend to the relationship of principal and agent. A pursuivant of the Herald's College is not, as to such privileges, in the position of a legal adviser.

In re Rutherford, Brown v. Rutherford.

[49 L. J. R., Ch. App. 654; L. R., 14 Ch. Div. 687.]

A promissory note payable three months after demand, more than twenty years old, was found amongst the payee's papers at his death. There were two indorsements, each more than twenty years old, of payment of interest. The maker died in 1869.

The M. R. : After such a lapse of time, I think payment of the note ought to be presumed. The promisor died in 1869, the promisee did not die until 1878, and yet meantime made no demand on the note. Moreover, the indorsements of payment of interest are evidence of demand, and that the interest was paid for forbearance. [See *Bamford v. Tupper*, 21 L. J. R., Exch. 6; 7 Exch. R. 27, which the judge followed. The Statute of Limitations ran from such demand.]

Ward v. Eyre.

[49 L. J. R., Ch. App. (affirming the M. R.) 657; L. R., 15 Ch. Div. 130.]

The M. R. : A statement of claim in an action for a balance which proves not to be the right sum is not a demand in writing, sufficient to found on it a claim for interest under 3 & 4 Will. c. 42, s. 28.

The Attorneys and Solicitors Act, 1870 (sect. 17), does not apply as between a country solicitor and his London agent.

Crawshaw v. Crawshaw.

[49 L. J. R., Ch. 662; L. R. 14 Ch. Div. 817.]

The M. R. : I am not at all certain that if I had had to decide *Humble v. Shore* (7 Hare, 247; 1 Hem. & M. 550 (n)) and *Lightfoot v. Burstall* (1 Hem. & M. 546; 33 L. J. R., Ch. 188), I should have done so as the judges there did. But

I am bound by these cases. They were, however, decided on the ground that a direction that a share of residue should fall into the residue was mere surplusage. In *Lightfoot v. Burstall*, V.-C. Wood deliberately rejected the meaning which he thought the testator probably had, on the ground that he might have used words expressing that meaning more clearly. He said that the assumption that a direction that a share should sink into a residue amounted to a gift of that share [with the residue] was "fallacious." I do not think so. The two cases, however, contain only the principle, that a direction that a share of residue shall sink into the residue merely means that the share of residue in question shall be disposed of in the way in which it shall be disposed of by law (*i. e.*, as on intestacy), that it is not a gift to the residuary legatees of that share. The M. R. then distinguished the words in this present will and codicil, which were in substance as follows:—Residuary, real and personal estate were given on trusts for sale and division of proceeds amongst all the children in equal shares on their attaining twenty-one, but the trustees were to stand possessed of the share of his married daughter A., upon trust for her during her life and after her death for her children, and, in default of children, for such persons as she should appoint, and, in default of appointment, the testator directed that such share should fall into and become part of his residuary personal estate, and be paid and applied accordingly. By a codicil the testator varied the ultimate gift by directing that his daughter's power of appointment should be limited to a moiety of her share of the residue, and that the other moiety should fall into and become part of his residuary personal estate, and be paid and applied according to the trusts of his will. The testator left him surviving seven children (including his daughter A.), all of whom attained twenty-one. The daughter died without issue, having appointed the first moiety of her one-seventh share of the residuary estate to her husband. The M. R. especially pointed out that the ultimate gift in the codicil had declared trusts of the second (unappointed) moiety of the married daughter's share

for certain persons, and those other persons were, in his opinion, the other six children, who were the residuary legatees. He held that they were entitled to this unappointed share.

COMMENT.

It is fairly evident that if the M. R. had been here sitting in the Appeal Court he would have overruled *Humble v. Shore* and *Lightfoot v. Burstall* (*sup.*), both of which are founded on a narrow view of the effect of a residuary gift. There is a somewhat analogous class of cases holding that "the comprehensive import of the word 'residue' does not extend to a gift of the *residue of that residue*" (Hawk. Const. Wills. 43). But that rule is very easily displaced by the expression of an intention to give the entire fund subject to the gift previously made out of it, in which case the residuary gift carries the previous gift, if it fails (*id.*). The tendency of the modern cases is to extend the effect of residuary dispositions so as to avoid any intestacy. In addition to the cases cited in Hawkins, see also *Re Davies' Trusts*, 41 L. J. R., Ch. 97; L. R., 13 Eq. 163; 25 L. T. R. 785. (See also *In re Savage's Trusts* (50 L. J. R., Ch. 131), where Hall, V.-C., followed *Humble v. Shore* and *Lightfoot v. Burstall*, distinguishing the above case.)



In re Harris, Jacson v. The Governors of Queen Anne's Bounty.

[49 L. J. R., Ch. 687; L. R., 15 Ch. Div. 561.]

Bonds by which sums advanced are, under the 3 & 4 Vict. c. 88, charged by justices at general or quarter sessions on the police rate are pure personalty, and may be bequeathed to a charity.

Attree v. Haue (47 L. J. R., Ch. 863; L. R., 9 Ch. Div. 337) decides that to be within the Mortmain Acts you must affect the land directly. This case is within the second part of *Thornton v. Kempson* (23 L. J. R., Ch. 977; Kay, 592). In that case the right of collection by direct proceeding against the land was assigned. Here it is not. The only remedy of the bondholder is to compel the guardians or overseers to pay them, leaving such officials to repay themselves by a rate. It is a charge by a person not having the

remotest connection with the land. It appears to me that *Attree v. Hauce*, in overruling *Ashton v. Lord Langdale* (20 L. J. R., Ch. 234; 4 De Gex & S. 402), overruled also *Finch v. Squire* (10 Ves. 41), but it is not necessary to decide that here.

[*Attree v. Hauce* is further explained and commented on in *Ashworth v. Munn*, L. R., 15 Ch. D. 363; 50 L. J. R., Ch. App. 107. See also *Jertis v. Laurence*, L. R., 22 Ch. D. 202; 52 L. J. R., Ch. 242.—V.-C. B.]

In re Johnson, Shearman & Robinson.

[49 L. J. R., Ch. 745; L. R., 12 Ch. Div. 548.]

Where a trustee is authorized by a testator or settlor to carry on a business with certain funds which he gives to the trustee for that purpose, the creditor who trusts the executor has a right to say, "I have the personal liability of the man I trusted, and I have also a right to be put in his place as against the assets; that is, I have a right to the benefit of any indemnity or lien which he has against the assets devoted to the purposes of the trade." The first right is his by contract; the second is a mere corollary to the numerous cases in equity by which persons are allowed to follow trust assets. The Court puts the creditor, so to speak, in the place of the trustee. But if the trustee has wronged the trust estate—that is, has taken out of the assets more than enough money to pay the debts, and then has put the money into his own pocket—there is no such equity to be put in the place of the trustee, because that would be a title to get nothing, nothing being due to the trustee, and the *cestui que trusts* are not taking the benefit. The right, when it exists, is simply to resort for indemnity to the assets actually employed in the trade. If, then, the trustee is not entitled, except on terms, to make good a loss to the trust estate, the creditors cannot have a better right, as they have to stand simply in his place. *The injustice which the rule avoids is that of the cestui que trust walking away with the assets which have been earned by the use of*

the property of the creditor: where the *cestui que trust* does not get that benefit the rule does not apply.

[See *Strickland v. Symons*, L. R., 22 Ch. D. 666; 52 L. J. R., Ch. 423.]

Cooper v. Whittingham.

[49 L. J. R., Ch. 752; L. R., 15 Ch. Div. 501.]

The law as to costs is that where a plaintiff comes to enforce a legal right, and there has been no misconduct, omission, or neglect on his part, the Court has no discretion to deprive him of costs.

The plaintiffs are the proprietors of an English copyright publication, and the defendants are the English agents of an American publisher. Americans can publish in their own country English copyrights without leave of the owners. The plaintiffs object to the publication of their copyright in this country, however, by the importation of magazines containing piracies. That is forbidden by the Copyright Act, 1842 (5 & 6 Vict. c. 45), sect. 17. That Act distinguishes between importation and sale. It says "knowingly sell," but not "knowingly import." An *ex parte* injunction against such importation without notice would be granted. It was said that as the 17th sect. created a new offence and enacted a penalty, the plaintiff was confined to enforcement of the penalty. The rule to that effect is subject to two exceptions—(1) The ancillary remedy in equity by injunction to protect a right; (2) That created by the Judicature Act, sect. 25, sub-sect. 8, enabling the Court to grant an injunction when "just and convenient." When an act is illegal [is irrecoverably injurious], and is threatened, the Court will prevent it, and will grant the injunction either between the threat and the act or after the act where there is an apparent intention to repeat it.

COMMENT.

The principle at law contended for in defence, and utilized by the M. R. in his arguments on sect. 25 of the Companies Act, 1865, is contained in *Stevens v. Jeacocke*, 11 Q. B. 741; 17 L. J., Q. B. 163.

Stewart v. Stewart.

[49 L. J. R., Ch. 763 ; L. R., 15 Ch. Div. 539.]

A testator gave his residuary estate to trustees and executors in trust for sale, and to stand possessed of the proceeds for his six children, whom he named, equally. Amongst these children were A. and B. After then reciting that he had advanced 4,000*l.* to A. and 500*l.* to B., he declared that neither of his said sons, nor any of his children, should be entitled to any part of his residuary estate without bringing the above sums, and all other sums given to any of his said children, with interest thereon at 5 per cent. per annum, from the respective times of advancement into hotchpot. By a codicil the testator revoked the provision made by his will for B., thereby causing a lapse of B.'s former share of the residue. The testator left a widow and his six children the next of kin.

The M. R. : The testator by his will meant his children to be equal *inter se*. The codicil revokes as to one child, the effect being to make the executors trustees for the testator's wife and children under the Statute of Distributions. The rule as to advancements applies to the lapsed share, because the next of kin are *children*. The Statute of Distributions applies to advancements made by a father to his children before the date of the will ; the equitable rule as to ademption applies to advancements afterwards. If the children are to take in the statutory shares the statute also must apply to advancements made after the will.

By the Chancery practice advancements under the statute are taken without interest up to the death ; from the death 4 per cent. is allowed. The testator directs interest from the advance. I have therefore to consider not the statutory advancement, but one under the will. If the codicil means, as I hold it to mean, " my executors are to hold one-sixth of the residue in trust for my wife and children, according to the Statute of Distributions," why should not the clause that none were to take the residuary estate without bringing into hotchpot apply ? I hold that it does apply.

Jones v. Rimer.

[49 L. J. R., Ch. 775; L. R., 14 Ch. Div. 588.]

The M. R.: During the argument I have felt what I very seldom feel—considerable difficulty, because there is a strong technical argument in favour of the appellant. The real question is, “Is this a fair particular?” Might a purchaser not fairly infer from it that there was no ground rent reserved on the lease? True that the particular is silent as to it, but it is very distinct indeed as to everything to be received. The statement is, “The whole held for the residue of a term of seventy-five years from the 16th September, 1845. This lot is offered for sale subject to a mortgage of 500*l.*, bearing interest at 5 per cent.” The fair construction of that is that there is no substantial rent reserved in the lease. Leases from the corporation who granted this were known to be at nominal rents. The ground rent really was 43*l.* per annum. It also appears that the reference to the ground rent was omitted from the particulars by mistake.

[Of course the strong technical argument was that notice of a lease is notice of all its contents.]

**Halsey v. Brotherhood.**

[49 L. J. R., Ch. 786; L. R., 15 Ch. Div. 514; affirmed
51 L. J. R., 233.]

There is no law to compel a man to enforce his legal rights by action. A *bonâ fide* notice not to infringe on rights, whether patent rights or otherwise, is quite justified, but proceedings must not be threatened for a collateral purpose. If, after notice of infringement given, the person to whom it is given denies the infringement and calls upon the other to prove what he alleges, and states that in default an application will be made for an injunction to restrain the interference with trade which such notice causes, an injunction against the notice or threat would (on proof negating infringement) be granted unless such action were brought within a reasonable time. This would be so although there might be no

liability at law for damages. Otherwise no injunction would be granted against the mere *bonâ fide* assertion of a right not known to be invalid.

Rollins v. Hinks (41 L. J. R., Ch. 358; L. R., 13 Eq. 355) and *Armann v. Lund* (43 L. J. R., Ch. 655; L. R., 18 Eq. 330, V.-C. Malins), have no doubt caused this action. The principle of law there stated, viz., that there is no presumption of the validity of a patent, is not sound. A patent is, *primâ facie*, good as long as it stands. In the second-named case the V.-C. intended to decide that the assertion of patent right was not *bonâ fide*. If the fact were so I agree that the injunction might go. It might undoubtedly properly be granted if the notice were either untrue to the knowledge of the party giving it or *bonâ fide*. The statement of claim being entirely confined to the past, and not containing any allegation that the defendant intends to continue to threaten the plaintiff's customers, and the action being in substance one for damages, although the claim to an injunction is supplementally added, I dismiss the action with costs. Application being made to amend, the M. R. said that he never granted such leave where there had been (as here) a charge of fraud which failed. He would dismiss the action without prejudice to any fresh action which might be brought for threatening the plaintiff's customers.

COMMENT.

The 46 & 47 Vict. c. 57, s. 32, now settles the law as to this.

In re Goodman's Trusts.

[49 L. J. R., Ch. 805; L. R., 14 Ch. Div. 619; reversed on appeal 50 L. J. R., Ch. App. 425.]

[The reversal having only been by L.JJ. James and Cotton, Lush, L. J., agreeing with the M. R., the judgments are given shortly.]

The M. R., in *Boyes v. Bedale* (33 L. J. R., Ch. 283; 1 Hem. & M. 798, V.-C. Wood), expressed his opinion that "if an intestate dies domiciled in England the division of

his property is governed throughout by English law, and no person could take by representation under that statute unless legitimate according to the law of England." [That is a dictum as to an intestacy.]

And in *In re Wilson's Trusts*, 35 L. J. R., Ch. 243; L. R., 1 Eq. 247, V.-C. Kindersley entirely agrees with this opinion, and decides thus:—"Now this will, being a will made in England, by an Englishman, domiciled in England, must be construed according to the law of England. Every term in it must receive that interpretation which belongs to it according to English law. Therefore, 'children' referred to in such a will mean children lawfully begotten, or legitimate children."

I agree with these cases.

On the appeal, L. J. Lush, in a most elaborate judgment, held that the decision was right. On the other hand, L.JJ. James and Cotton held that the question of legitimacy was one of status, to be determined by the law of the country of the parents' domicile at the time of the child's birth, and that our law, except as to real estate situate in England, recognizes and acts on this status. They disapproved *Boyes v. Bedale* (*supra*).

The question therefore, so far as the opinions of modern judges is concerned, seems to stand thus:—

The opinions of V.-C. Wood (Lord Hatherley), V.-C. Kindersley, the M. R., and L. J. Lush are opposed to those of L.JJ. James and Cotton.

It is presumed that the question must soon be decided in the House of Lords.

In re Boyd's Settled Estates.

[49 L. J. R., Ch. 808; L. R., 14 Ch. Div. 626.]

Cash under the control of the Court cannot be invested on the mortgage of long leasehold terms, nor do such securities answer the description of "real securities."

COMMENT.

Under the Conveyancing and Law of Property Act, 1882 (sect. 65), terms of years not originally less than 300 years can be converted into fee simples, as there provided, and thus, of course, can be made "real securities."

Sykes v. Schofield.

[49 L. J. R., Ch. 833; L. R., 14 Ch. Div. 629.]

The judgment in a partition action under sect. 3 of the 1868 Act may provide for an application for sale being made by any person interested, as soon as it has been certified that all persons who are not parties to the action who ought to be served with notice of judgment have been so served, and this although the parties to the action are not interested in a moiety of the property proposed to be sold. The application for sale should be made in chambers. The fact that the action was commenced in a district registry makes no difference.

Seear v. Lawson, Chatterton v. Lawson.

[49 L. J. R., Bank. App. 69; L. R., 15 Ch. Div. 426.]

The right to bring an action is part of the "property" of a bankrupt which passes to the trustee. If the trustee sub-sells such right, and the sub-vendee gets his name inserted as plaintiff, there is nothing against that course, the law as to champerty and maintenance having no application.

***In re* Van Hagan, Sperling v. Rochefort.**

[L. R., 16 Ch. Div. 18; 50 L. J. R., Ch. App. 1.]

The M. R.: V.-C. Malins decided this case on the ground that there is a distinction between real and personal estate as regards the law applicable to exercise of powers of appointment. There are quite sufficient distinctions between the law applicable to the two kinds of property without introducing a new one for the first time. The effect of a testa-

mentary appointment, either of realty or personalty, to a trustee in trust for A., who dies in the lifetime of the testator, is, that there is a resulting trust for the original settlor or appointor. As to a general appointment the resulting trust would be for the appointor. The property does not go to the person to whom the original donor of the power gives it in default of appointment, but results to the appointor. "A testamentary appointment, under a general power to A. in trust for B., which lapses as to the beneficial interest by B.'s death before the appointor, operates as a good appointment in favour of A., who holds on the same trusts as if it had been the appointor's own property." (Wickens, V.-C., *In re Davies Trusts*, 41 L. J. R., Ch. 97; L. R., 13 Eq. 163.)

The order will be that the surviving trustee is entitled as devisee, subject to a resulting trust for the heir-at-law (if any). So that, if there is no heir-at-law, the trustee will take as against the Crown. A testator is assumed to contemplate that his donee will survive him. Therefore he intends that no one shall take under the settlement creating the power. Beyond that there is no evidence of intention.

Cope v. Cope.

[L. R., 16 Ch. Div. 49; 50 L. J. R., Ch. 13.]

The M. R.: The question is raised by some obscure dicta in musty old law books (*Prince's Case*, 5 Co. 29 b, Williams on Executors, 490) about the powers of an administrator *durante minoritate*. During his office he is an ordinary administrator, and has all his powers, of course that of mortgaging the assets.

Aslatt v. The Mayor and Corporation of Southampton.

[50 L. J. R., Ch. 31; L. R., 16 Ch. Div. 143.]

Neither sect. 52 of the Municipal Corporations Act, 1835, nor sect. 21 of the Debtors' Act, 1869, disqualifying any

member of the corporation who shall "compound with his creditors," "whether such composition is made by deed or otherwise," applies to a composition effected by private arrangements outside the Bankruptcy Acts. Since the Judicature Act I have power to injoin persons improperly threatening to remove a member of such a corporation from office, and I do so accordingly.

Pearks v. Moseley.

[50 L. J. R., Ch. (H. L.) 57 (affirming the decision of the M. R., reported 11 Ch. Div. 555, and that of the Appeal Court supporting it); L. R., 5 App. Cas. 714.]

A testator bequeathed 3,000*l.* in trust for his son for life, with remainder to all the children of the son who should attain twenty-one years, and the issue of such as should die under that age leaving issue, which issue should afterwards attain twenty-one, or die under that age leaving issue, living at his, her, or their decease or deceases respectively, as tenants in common, if more than one; but such issue to take only the shares which their parents would have taken if living. Held that the gift to children and issue of the children was inseparable, and therefore that the whole gift to them was void for remoteness.

The L. C. (Selborne): You do not import the law of remoteness into the construction of the instrument by which you investigate the expressed intention of the testator. You take his words and their meaning as if there had been no such law. But you cannot alter or wrest the fair construction in order to escape from the consequences of the law. The words upon which everything here turns, "*Which issue shall afterwards attain the age of twenty-one years, or die under that age leaving issue, living at his, her, or their decease or deceases respectively,*" are words of description and not words of superadded condition. If the gift had not been so qualified, but had been confined to "all the children of the testator's son who shall attain twenty-one, and the lawful issue of such of them as shall

die under the age of twenty-one years leaving lawful issue at his, her, or their decease or respective deceases," there would have been no remoteness. The shares would be ascertainable within due limits, and subsequent super-added conditions as to some share or shares, which conditions might be void for remoteness, would not be material.

The Union Bank of London v. Ingram.

[50 L. J. R., Ch. 74; L. R., 16 Ch. Div. 53.]

Although a mortgagee in possession has punctually received rents equal to his interest, yet the mortgagor cannot claim that thereby his covenant to pay the interest punctually is satisfied so as to only entitle the mortgagee to the lower rate of interest reserved in the covenant for reduction on punctual payment. A mortgagee who takes possession incurs serious responsibilities, as he is liable for wilful defaults, both of his agent and himself, and has to take considerable trouble. Rents are not necessarily appropriated to interest. Any receipts by the mortgagee, *e. g.*, fines on copyholds, may be so applied. *Stains v. Banks* (9 Jur. N. S. 1049) was reversed on appeal. (Reg. Lib. 7 B. 1863, 1761.) Fisher on Mortgages, p. 934, 2nd ed.; 997, 3rd ed. requires correction in the citation of the above.

Palmer v. Locke.

[50 L. J. R., Ch. App. 113 (affirming the M. R.);
L. R., 15 Ch. Div. 294.]

M. had a limited power of appointing a trust fund by will amongst his children. In default of appointment the fund was given to these children equally. By his will, M. appointed 5,000*l.* to his son J. Shortly after the date of his will he executed a bond to his said son J., whereby, after reciting the power and the appointment already made by will, he bound himself that J. should receive either out of the trust fund or out of M.'s own property 5,000*l.* at the least. M. died without having revoked his will.

Held that the appointment was a good exercise of the power, and that the fact that it might have the effect of releasing M.'s estate from liability under the bond made no difference.

Coffin v. Cooper (34 L. J. R., Ch. 692; 2 Dr. & S. 365) followed. L. J. James: Such a power is fiduciary only to the extent that the donee must not exercise it for any corrupt purpose, or to benefit himself or oppress anyone else. (*Duke of Portland v. Topham*, 34 L. J. R., Ch. 113; 11 H. L. C. 32.) Mere suspicion, because the bond was executed six weeks after the will, that there was a corrupt bargain between the father and son will not avoid the appointment.

Brett, L. J.: *Coffin v. Cooper* was right in principle. I think it does not matter whether the covenant was entered into before or after execution of the will. I consider the bond here, and its covenant, void, as a fetter upon the power of appointment. I have difficulty in agreeing with *Davies v. Huguenin*, 32 L. J. R., Ch. 417; 1 Hem. & M. 730.

Cotton, L. J.: I hesitate to say that such a bond is void. It has been held that such an instrument is good as a release of the power: if bad, it must be bad *in toto*. I do not think it could be good as a release and bad as a covenant.

COMMENT.

By sect. 52 of the Conveyancing and Law of Property Act, 1882, "a person to whom any power, whether coupled with an interest or not, is given, may by deed release, or contract not to exercise, the power," and the section is made retrospective.



Greaves v. Tofield.

[50 L. J. R., Ch. App. 118; L. R., 14 Ch. Div. 563.]

In this important case the M. R. had held that the effect of the 18 & 19 Vict. c. 15, s. 12, as to the registration of annuities charged on land was to make them invalid, if unregistered, as against incumbrancers even with notice, and that the statute was passed to avoid letting in the dangerous doctrine of constructive notice. The L.JJ. held that the Act had not this effect, and, therefore, that such annuities, even

though unregistered, bound incumbrancers with notice of them and the trustee in bankruptcy of the man who originally granted them.

Athill v. Athill.

[50 L. J. R., Ch. App. 123 ; L. R., 16 Ch. Div. 211.]

The M. R. : Here there are two mortgages of even date, the one on freehold and the other on leasehold property, executed to secure the same sum, and as collateral to one another. The incidence of the debt is a question of construction, having regard to the nature of the transaction and the position of the parties, &c. In the absence of express provision one property is not to be resorted to in preference to the other, but the debt is borne rateably according to values of the properties.

COMMENT.

And see ante, p. 250.

Williamson v. Barbour.

[50 L. J. R., Ch. 147 ; L. R., 9 Ch. Div. 529.]

This was a bill by principals against their agents to rectify settled accounts and to take accounts generally.

The Court first considers whether accounts shall be opened, or liberty given to surcharge and falsify. It is not necessary that the errors shown should amount to fraud. If they are sufficient in number and importance the Court opens the accounts. This particular case extends to accounts over twenty years. Where a single fraudulent item is shown, and the position is fiduciary (as here) the Court has opened older accounts than these (*Alfrey v. Alfrey*, 17 L. J. R., Ch. 30 ; 10 Beav. 353). In either case—*i. e.*, of numerous important errors or one fraudulent error—the Court opens the accounts, and does not merely give liberty to surcharge.

If one of several partners knows that a vendor is defrauding the firm, that knowledge would not prevent the remaining partners from suing the parties to the fraud, and recovering in equity.

In re Clay and Tetley.

[50 L. J. R., Ch. App. 164; L. R., 16 Ch. Div. 3.]

The M. R. : The only implied power to sell the real estate of the testator is in the executors. That power is implied because they are appointed by the testator to pay his debts. No such power has ever been considered to be vested in an administrator, who is not appointed by the testator, but is an officer of the Probate Court.

The 16th sect. of the 22 & 23 Vict. c. 35, confines the powers thereby given to executors.

In re The Alma Spinning Company.

[50 L. J. R., Ch. 167; L. R., 16 Ch. Div. 681.]

Directions in articles of association that the making and forfeiture of calls and other ordinary business is to be done by not less than a certain number, or by not more than a certain number, are imperative and not merely directory. Consequently a forfeiture of shares declared at a meeting when there are less than the specified number present is void.

In *The Thames Haven Dock and Rail. Co. v. Rose*, 12 L. J. R., C. P. 90; 4 Man. & G. 552, two of the judges (C. J. Tindal and J. Maule) did intimate (*obiter*) their opinion that the provisions as to calls were, as mere arrangements for internal management, directory only.

But the case did not turn on that but on the fact that there was a good debt admitted, and that it was too late after judgment for the defendant to plead that the calls were not well made. And in the subsequent case of *Kirk v. Bell*, 16 Q. B. R. 290, the provisions as to the necessity for a certain quorum were held to be imperative.

Allen v. Taylor.

[50 L. J. R., Ch. 178; L. R., 16 Ch. Div. 355.]

Where a man grants a house in which there are windows, neither he nor anyone claiming under him can stop up the windows or destroy the lights (*Palmer v. Fletcher*, 1 Lev. 122; 1 Sid. 167, 227). The principle is that a man must not derogate from his own grant. It is the same whether the grant is simply of a house as such, or the house with its windows and lights.

It is equally settled that if a man who has a house and land grants the land first, reserving the house, the purchaser of the land can block up the windows of the house. If the owner of the land and the house sells the house and the land at the same moment, expressly selling the house with the lights, the purchaser of the land cannot block up the lights, the vendor being the same in both cases, and each purchaser being aware of the simultaneous conveyance to the other. In equity that is one transaction.

Dent v. The London Tramways Company.

[50 L. J. R., Ch. 190; L. R., 16 Ch. Div. 344, citing also *Davison v. Gillies*, L. R., 16 Ch. Div. 347, n., also decided by the M. R. on the same subject.]

Here there is a bargain made with the company that certain persons will, as preference shareholders, advance the company money. The preferential dividend stipulated for is 6 per cent. over the ordinary shares "dependent on the profits of the particular year only;" that is, the preference shareholders only take a dividend if there are profits in that year enough to pay it. If there are not enough in that year they lose it for ever. If more than enough in its next they still only get six per cent. They are co-adventurers for each particular year. The company here argue that as they have paid improperly to ordinary shareholders funds which (as

profits available for preference shareholders) they ought to have paid to them, they are entitled to make good their deficiency by taking away the fund (available for the preference shareholders) to put the tramways in order. Of course this is not so. The company must recover from the ordinary shareholders if they can.

Evans v. Williamson.

[50 L. J. R., Ch. 197; L. R., 17 Ch. Div. 696.]

A testatrix, who died in 1879, gave all her real estate to her daughter for her separate use for life, with remainder to her children. She gave to her grand-daughter 1,000l., "and all the household furniture, farming stock, goods, chattels, and effects which should be in and about" a freehold farm called F., belonging to her, at her decease. The question was whether the growing crops on F. farm passed with the devise of the real estate, or to the grand-daughter under the above bequest.

The M. R.: I am bound by the authorities to hold that the specific legatee takes the emblements, *i. e.*, the growing crops. The case is almost identical with *Cox v. Godsalve* (6 East, 604, n.), followed by Lord Ellenborough, in 1807, *West v. Moore* (8 East, 339), and by Lord Gifford, in 1825 (*Blake v. Gibbs*, n. to *Vaisey v. Reynolds*, 6 L. J. R., Ch. (O. S.) 172; 5 Russ. 12). *Vaisey v. Reynolds* (Sir John Leach) is the only authority the other way, and is untenable. In *Rudge v. Winnall* (18 L. J. R., Ch. 469; 12 Beav. 357) there was a gift of the general personal estate with "live and dead stock." I cannot trace from the report whether the late M. R. held the crops to pass in consequence of the general gift, or under "live and dead stock." Here there is no gift of general personalty, but *Cox v. Godsalve* is an authority that "farming stock" includes stock not movable.

COMMENT.

It is singular that the M. R. was not referred to *Cooper v. Woolfitt* (26 L. J. R., Exch. 310; 2 Hurl. & N. 122). In that case the words, "all my monies, securities for money, household furniture, goods, chattels, personal estate and effects whatsoever and wheresoever not hereinbefore specifically bequeathed," were held by Pollock, C. B., Martin, Bramwell, and Channell, BB., not sufficient to carry the emblements as against a devisee in fee of the real estate on which they grew. It will be observed, however, that there was no bequest of "stock" or "farming stock" there. The judges put the question as one whether the words employed in the bequest of the personalty were so clear as to rebut the presumption that the devisee of land takes the emblements on it. There must be something pointing to a specific intention to include the growing crops to take them away from the devisee. Of course the above cases show that the words "stock" or "farming stock" will amount to that something.

In re Phillips, Ex parte **The National Mercantile Bank.**

[50 L. J. R., Ch. App. 231; L. R., 16 Ch. Div. 104.]

The importance of this decision as to the including of "growing crops" in a bill of sale, and the effect thereof on subsequent bankruptcy of the giver of the bill of sale, is lessened by the provisions of the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), and the Bills of Sale Act, 1882 (45 & 46 Vict. c. 43).

The decision was on a bill of sale unaffected by either of the above acts, but was that growing crops, not being personal chattels, pass with the land, and that therefore the deed would not, as to them, require registration (up to 31st December, 1878); but that when severed such crops became personal chattels, and subject to all the incidents of reputed ownership, &c., of them on bankruptcy.

Gowan v. Gowan.

[50 L. J. R., Ch. 248; L. R., 17 Ch. Div. 778.]

A testatrix gave 5,000*l.*, to be held by her trustees and executors until her son married, "the said sum then to be settled on his wife and children." The son married. The question was as to form of proper settlement.

The M. R.: In ordinary cases the husband and wife, or the survivor, ought to have powers of appointing the fund amongst the children.

Oliver v. Oliver (48 L. J. R., Ch. 630; L. R., 10 Ch. Div. 765) seems to me contrary to *Cogan v. Duffield* (45 L. J. R., Ch. 307; L. R., 2 Ch. Div. 44), and to be wrong on this point.

The limitations must be to the wife for life for her separate use, remainder to her husband for life, with remainder as they jointly by deed appoint, with remainder as the survivor by deed or will appoints (but if the wife is survivor she is to have power to appoint amongst her children by a future marriage), and an ultimate remainder to all the children of the wife who attain twenty-one, or, as to daughters, who marry under that age with proper consent.

**The Guardian Fire and Life Assurance Company v.
The Guardian and General Insurance Company,
Limited.**

[50 L. J. R., Ch. 253; 43 L. T. (N. S.) 791.]

I consider that the defendant company have taken a name so very similar to that of the plaintiffs' with a view to appropriate some of the plaintiffs' business. [The defendants undertook to change their names to "The Guardian Horse, Vehicle, and General Insurance Company," and so saved an injunction.] And see next case; and *ante*, p. 232.

Hendriks v. Montagu.

[50 L. J. R., Ch. 257; on appeal (in which further evidence was admitted), 50 L. J. R., Ch. App. 456; L. R., 17 Ch. Div. 638.]

The 20th sect. of the Companies Act, 1862, which prevents a second company from taking a name similar to that of a prior registered company, plainly only applies in favour of a *registered* company.

You can restrain a defendant company or person from carrying on a business with a view to appropriate a previously-established business or part of it, or where such appropriation has taken place even without proved evil intent. It is the unfair appropriation of a portion of the plaintiff's business which is prevented by injunction. An application to register in a name which, from its similarity to that adopted by another company, will probably so result, will be restrained.

If it is a mere matter of conjecture or opinion as to whether the business complained of will injure the other business, an injunction cannot be granted. As to injunctions *quia timet*, it must be shown that the feared result must inevitably follow [or that, in the opinion of the Court, the intention is to deceive, or to violate some right.—L.JJ.].

I do not, as a rule, allow amendments to raise a charge of fraud where the case has been launched independently of fraud.

[The L.JJ. only differed from the M. R. as to the result of the evidence, and not from his exposition of the law. L. J. Brett explained this.]

In Re Worth.

[50 L. J. R., Ch. 262; L. R., 18 Ch. Div. 521.]

Under the 37th sect. of the Solicitors' Act, 1843, the Chancery Division has jurisdiction to tax solicitor and client costs of any proceeding on the equity side of a county court where the amount involved exceeds 20*l*.

In Re Hardman, Pragnell v. Batten.

[50 L. J. R., Ch. 272 ; L. R., 16 Ch. Div. 360.]

In a partition action (under 39 & 40 Vict. c. 17, s. 3), where a sale is asked for by some of the parties, but others interested are absent, the court will not preface the order by a declaration that a sale is more beneficial than a partition. [Followed by Hall, V.-C., in *Waite v. Bingley* (51 L. J. R., Ch. 651 ; L. R., 21 Ch. D. 675.).]

In re The Northern Counties of England Fire Insurance Company, Limited.

[50 L. J. R., Ch. 273 ; L. R., 17 Ch. Div. 337.]

A. held a policy of insurance against fire granted by a limited company, which had been ordered to be wound up. After the order but before time for sending in claims, a fire occurred, causing loss above the amount of the insurance. Held that A. was entitled to prove for the full amount of his policy.

The M. R. : I have not seen the judgment in *In re The Withernsea Brick Works* (L. R., 16 Ch. Div. 337, and *supra* cit.), but understand that the judgment was confined to the first words in sect. 10 of the Judicature Act respecting "the rights of secured and unsecured creditors." I understand that the Court of Appeal held that sect. 10 does not incorporate all bankruptcy rules, but only the rule in *Kellock's case* (39 L. J. R., Ch. 112 ; L. Rep. 3 Ch. 769). It appears to me that the meaning of the section is, as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities, that the law of Bankruptcy is to apply. Under sect. 31 of the Bankruptcy Act, 1869, I consider that any liability, contingent at the date of the adjudication, but which ripens into a debt during the bankruptcy, is provable. [See now 46 & 47 Vict. c. 52, s. 37.]

I should come to the same conclusion under the Winding-up Acts. Sect. 158 of The Companies Act, 1862, is evidently

framed to extend the right of proof to such cases. Independently of this the judges in *In re The Trent & Humber Co.*, 38 L. J. R., Ch. 38; L. R., 4 Ch. 112, thought (and I agree) that if before the time of the proof the contingency has happened, so that the debt is exactly ascertained, it may still be proved, *i. e.*, the rule is not wanted, because you can ascertain the amount of the debt without it. *

[Followed again by the M. R. in *In re Bridges, Hill v. Bridges*, 50 L. J. R., Ch. 470; L. R., 17 Ch. Div. 342.

**The Oceanic Steam Navigation Company
v. Sutherland.**

[50 L. J. R., Ch. App. 308; L. R., 10 Ch. Div. 236.]

An administrator may make a fair underlease of his intestate's leaseholds, but this is an exceptional method of dealing with the assets, and the underlessee would take subject to the question whether under all the circumstances the underlease was desirable. Such administrator cannot, any more than an ordinary trustee can, give the underlessee an option to purchase at the expiration of the term at a fixed price. That would fetter the exercise of the trust for sale by preventing the administrator from selling to anyone but the underlessees for seven years at a price fixed in advance.

Long v. Ovenden.

[50 L. J. R., Ch. 314; L. R., 16 Ch. Div. 691.]

The trust in this will (exercising a power given by marriage settlement) is to pay one-third part of the settled funds, after the cesser of enjoyment by C., the father, to the grandson as and when he shall attain twenty-one, and in case he shall die before attaining twenty-one, then over to an object of the power. The grandson is not an object of the power, and therefore, of course, the appointment to him is bad; but the

appointment, if he dies under twenty-one, in favour of one object of the power, will take effect as being within the limits of the rule as to remoteness.

The only question is what becomes of the income of the one-third after the death of C. until the event happens of the grandson attaining twenty-one, or dying under that age. Is it unappointed or does it go with the capital? I have no doubt it goes with the capital, *i. e.*, in the one event to the appointee, who is an object of the power, and in the other event as in default of appointment.

The capital is part of an ascertained trust fund. It is the same in effect as, and analogous to, a specific legacy with postponed enjoyment. That carries intermediate income. If a testator gives 10,000*l.* consols, standing in his name, to A. on his attaining twenty-one, A. gets the consols and the dividends as from the death. Indeed, even as to *severed* general legacies interest is allowed as from the death.

If a flock of sheep were given, to be delivered to A. on his attaining twenty-one, I suppose the intermediate increase of the flock would pass.

So when you give a third or other share of a fund over which you have a power of appointment to A. B. at twenty-one, it carries with it the whole accretions of that share of the fund in the meantime, either by way of income or otherwise.



The Cape Breton Company (Limited) v. Fenn.

[50 L. J. R., Ch. App. 321 ; L. R., 17 Ch. Div. 198.]

If a contributory to a limited company obtains leave to take proceedings in the name of a company upon giving such indemnity as the Court shall direct, the indemnity must be given as a condition precedent, and be made the subject of a second substantive application to the Court.

The solicitor of any contributory who may have obtained such an order cannot intervene to continue the proceedings and get costs in case of the bankruptcy of his client, the con-

tributory. The only ground for allowing the interference of the contributory himself is the principle by which a *cestui que trust* can compel his trustee to allow his name to be used to recover the trust property.

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In re **Rees, Rees v. George.**

[50 L. J. R., Ch. 328; L. R., 17 Ch. Div. 701.]

This is an ordinary gift of residue upon trust for the testator's wife for life, with remainder to his children, with a proviso for bringing into hotchpot sums which he advanced to them during his lifetime. How is the property to be divided amongst the children so as to give effect to the hotchpot clause? All the advances which the testator directs to be brought into hotchpot are those which he has made. There is no reference to interest on those advances. The meaning is that the children are to share equally in the residuary estate as it is after the widow's death. You must, therefore, reckon interest on the advances as from that time up to the period of distribution. The object is to make the children equal in the residue to be divided between them, and in nothing else.

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Pascoe v. Richards.

[50 L. J. R., Ch. 337; 44 L. T., N. S. 87; 29 W. R. 330.]

Upon admissions in reply and previous pleadings a defendant who has not counter-claimed may, under Order XL., r. 11, apply to have the action dismissed as to him, on the ground that the plaintiff is not entitled to any relief against him. The words "relief claimed" include relief from the position of defendant.

Litton v. Litton, or *Linton v. Linton* (46 L. J. R., Ch. 64 (V.-C. Hall); L. R., 3 Ch. Div. 793), considered and qualified.

In re Finch, Abbiss v. Burney.

[50 L. J. R., Ch. App. 348; L. R., 17 Ch. Div. 211.]

The M. R.: The questions are—(1) Whether the rules as to remoteness apply as to what has been termed *an equitable remainder*; and (2) Whether here there is a true equitable remainder or an executory devise.

There is a devise of freeholds to named trustees and their heirs, upon trust to pay the rents to the wife, M., for her life, then upon trust, that the trustees should, during the life of one H. M., an alien, who was then living, retain the rents for their own use during the natural life of the said H. M., and after his death upon trust to convey the freeholds “unto such son of W. M. as shall first attain the age of twenty-five years, when he shall have attained his said age of twenty-five years, his heirs and assignees absolutely for ever.” Then follow certain names and arms, conditions, and a direction that, in the meantime, the rents should accumulate for his and their benefit. W. M. had a son, who, after the testator’s death, but during the lifetime of testator’s wife M., attained twenty-five. The wife and H. M. are both now dead.

If this is an equitable limitation—a limitation by way of equitable devise—it is void for remoteness; the rule is that to be valid the devise must take effect within a life in being and twenty-one years afterwards. It was said that the gift to the son of W. M. was an equitable remainder which, according to the law of remainders, could only take effect on the death of the survivor of the wife M. and H. M.; that, consequently, as the son of W. M. was then living and had attained twenty-five, it could not be void for remoteness, as it must take effect not only within the life but within the life in being and twenty-one years afterwards. It is not accurate to say that contingent equitable remainders stood on the same footing as contingent legal remainders. The rule as to the latter is the old feudal rule that there must always be a tenant to render services to the lord. The legal estate in the trustees fulfilled the feudal necessities, and there was no reason why the

limitation, in remainder, of the equitable interest, should not take effect according to the intention of the testator. This illustration will explain: where the fee is vested in trustees upon trust for a man for life, and after his death upon trust for such of his children as being sons attain twenty-one, or being daughters attain that age or marry under that age, and at the death of the tenant for life there are some children adult and some minors, it has always been held that the minors take; but, if equity followed the law, then, as there were at the death of the tenant for life persons capable of taking, viz., the adult children, they would take to the exclusion of the minor children. When the legal fee is outstanding in trustees, therefore, the part of the doctrine of contingent legal remainders which compelled a vesting at the termination of the prior estate of freehold, ceases to have any application. [The M. R. observes that even as to the legal contingent remainder the law had now been altered by statute. See 40 & 41 Vict. c. 33.]

I find no equitable remainder here. It is a gift to the trustees upon trust for the lady for life, then for their own benefit, which is not an equitable remainder, because they, having the legal ownership, there is no such thing as a separate equitable estate. The direction to convey does not give the son of W. M. an equitable remainder. It is an executory limitation, subject to all the laws with regard to executory limitations [and amongst them to the rule against remoteness].

Smith v. Dale.

[50 L. J. R., Ch. 352; L. R., 18 Ch. Div. 516.]

Two executors or trustees appeared by the same solicitor. One of them received money belonging to the estate, and has made default in paying it over. The other executor had nothing to do with the receipt of the money, and is not liable for it. If there had been no question of default in the case, or if the executor, who is not a debtor to the estate, had

appeared separately, he would have been entitled to all his costs. But the defaulting executor would not have got costs until he had made good his default. If the executors appear together the same rule is applied, the costs of the defaulting executor being disallowed. It is argued that if one of the executors is not a defaulter he is to get not only his own costs but all the costs of his co-executor. That is not so. That would give his solicitor the costs of the defaulter. If the solvent executor appears by the same solicitor as the defaulter it is his own fault or misfortune.

I dissent from *Watson v. Row*, 43 L. J. R., Ch. 664; L. R., 18 Eq. 680.

COMMENT.

See *Re Basham, Hannay v. Basham* (52 L. J. R., Ch. 408; L. R., 23 Ch. Div. 195), where Chitty, J., followed the above, approving also North, J.'s decision in *Lewis v. Track* (21 Ch. Div. 863), but not following *Clare v. Clare* (51 L. J. R. 53; L. R., 21 Ch. Div. 867—V.-C. Hall).

In re **The Mutual Society.**

[50 L. J. R., Ch. 400; L. R., 18 Ch. Div. 530.]

The costs of a representative contributory summons in the winding-up of a company are not to be allowed as between solicitor and client.

Part's case (L. R., 10 Eq. 622—V.-C. Bacon) not followed on this point.

The M. R. in *The Original Hartlepool Collieries v. Gibb* (46 L. J. R., Ch. 311; L. R., 5 Ch. Div. 713), and *Varasseur v. Krupp* (L. R., 15 Ch. Div. 474), held that a counter-claim could not be brought in respect of a cause of action arising after the issue of the writ in the original action. Fry, J., in *Beddall v. Maitland* (L. R., 17 Ch. Div. 174; 50 L. J. R., Ch. 40) held otherwise. And in *M'Gowan v. Middleton* (52 L. J. R., Q. B. 355), *Varasseur v. Krupp* was overruled. A counter-claim is to be treated as a cross action.

The Plating Company (Limited) v. Farquharson.

[50 L. J. R., Ch. App. 406 ; L. R., 17 Ch. Div. 49.]

The M. R. : To justify an order for committal of a printer for contempt in the insertion of advertisements it must be shown that they would convey to a person of ordinary intelligence the fact that they would be likely to interfere with the administration of justice. These motions against editors and printers of newspapers should be discouraged. I do not profess to understand *Pool v. Sacheverel* (1 P. Wms. 675) as reported. The advertisement there was treated as a direct inducement to the subornation of perjury. Upon the facts stated in the report I should have differently concluded. [Motions intended only to result in an apology and payment of costs are in themselves a contempt of Court. (L.J.J. Cotton and James.)]

Emma Silver Mining Company v. Grant.

[50 L. J. R., Ch. 449 ; L. R., 17 Ch. Div. 122.]

The M. R. : An agent for the purchaser of a horse—say, his groom—goes to the vendor and says, “What will you take for it?” and the vendor replies, “I will take 100*l*.” The agent says, “Make it 120*l*., and we will divide the 20*l*.” Is that transaction a fraud upon the purchaser or not?

In this case you have only to substitute 100,000*l*. for the horse and these two great financial agents for the groom, and the two cases are substantially identical. This is a fraud. Is it a “breach of trust” within sects. 31 and 49 of the Bankruptcy Act, 1869? I think so. The injured company can prove under G.’s liquidation for the sum found due from him as a promoter under the undisclosed agreement with the vendors.

In re Methuen and Blore.

[50 L. J. R., Ch. 464; L. R., 16 Ch. Div. 696.]

D. P. made her will in 1854, thus: "I commit to paper my wishes respecting the disposal of my property, and give this as my last will and testament. Everything I am possessed of I leave to my dearest sister, S. P., for her life. After her death I give and devise, as here annexed." Then followed some specific and pecuniary legacies, some of which were expressed to be "devised" to the legatees. The will then concluded: "My two nephews, H. H. M. and F. P. M., I leave my executors, and the latter residuary legatee." In 1869 the testatrix made a codicil to her will, but it referred only to some legacies given by it. At the respective dates of her will and codicil she had no freehold property, but afterwards purchased some, and it belonged to her at the time of her death.

The M. R.: The fact that at the date of her will this lady had no freeholds is not without importance. The presumption against intended intestacy is not so strong as to property which there was no present intention to acquire. The expression of the *wishes* of the testatrix "respecting the disposal of her property" does not amount to a disposal of that property. S. P. takes *all*, land included, during her life; but, although everything is left to a person for life, it does not follow that everything is left after her decease. It does not appear to me that there is in this will the amount of context necessary to give "residuary legatee" the meaning of "residuary devisee." *Hughes v. Pritchard* (46 L. J. R., Ch. 840; L. R., 6 Ch. Div. 24) turned on the general words at the beginning and the gift of parts of real property contained in the will.

In re Grundy, Kershaw & Co.

[50 L. J. R., Ch. 467; L. R., 17 Ch. Div. 108.]

Sect. 38 of the 6 & 7 Vict. c. 79 (The Solicitors Act, 1843) (third party clause), only applies to solicitor and client costs.

If on a party and party taxation, where the party taking the taxation pays the costs, the solicitor whose bill is under taxation delivers an extortionate bill with a view to increase the costs of taxation, the Master can specially report the circumstances, and the Court may deprive the solicitor of his costs, and make him pay the costs of the taxation.

Rayner v. Preston.

[50 L. J. R., Ch. App. 472; L. R., 18 Ch. Div. 1 (affirming the M. R.).]

A house insured against fire by the vendor was, after the date of the contract, offered for sale, but, before completion, partly burnt down, and the vendor received the insurance monies. There was no provision in the contract as to insurance. Held (diss. James, L. J.) that the purchaser could not, as against the vendor, recover the insurance money either as an abatement of his purchase money or for the reinstatement of the premises.

The M. R. (L. R., 14 Ch. Div. 297): If the matter had been *res integra* I might have found some way of assisting the plaintiff, but the case is concluded by authority.

In *Paine v. Meller* (6 Ves. 349), decided by Lord Eldon seventy-nine years since, the judge plainly puts it that in buying a house you do not buy the existing policy.

In *Poole v. Adams* (33 L. J. R., Ch. 639; 12 W. R. 68), V.-C. Kindersley held that in the absence of any provision in his contract a purchaser of a house is not entitled to the benefit of an existing insurance against fire.

The L.JJ. Cotton and Brett upheld the M. R. Both expressed a doubt as to whether, as between the vendor and the insurance company, the vendor could retain the money.

COMMENTS.

The ultimate result of this litigation is shown by *Castellain v. Preston*, 52 L. J. R., Q. B. App. 366. The insurance company recovered from the vendors the amount paid by them. It was held that the contract of insurance was one of full indemnity to

the amount assured, and nothing more; that the defendant had received the full purchase money as well as the insurance money, and must therefore bring into account the part of the purchase money received by him subsequently to the payment of the insurance money, such part having diminished the loss.

Unless the amount recovered as above was paid over to the purchaser, it is plain that he is without legal remedy in such a case. The lesson to purchasers is—(1) *Either, on signature of contract, to insure against fire in their own names, or (2) To satisfy themselves that there is an existing sufficient insurance, and that the contract passes to them the benefit of such insurance.*

Kinsman v. Rouse.

[50 L. J. R., Ch. 486; L. R., 17 Ch. Div. 104.]

The 3 & 4 Will. 4, c. 27, s. 28 (Statute of Limitations), means that the mortgagor shall not, after the time and under the circumstances there mentioned, redeem the mortgage *on the land of which possession is taken*. The section says “*any*” land, not “*the*” land.

If a mortgagee, taking possession, omits, by mistake, to take possession of a piece of land comprised in the mortgage (not knowing that it is so comprised), and some other mortgagee takes possession of that piece, would the first mortgagee lose the benefit of the possession he had taken under his mortgage? Certainly not. In this case the mortgagees have been in possession of part of the land for more than twenty years, which is a sufficient compliance with the section. Then it is said that by sect. 16 the right of the mortgagor is saved by his absence beyond seas, but sect. 16 does not apply to a mortgagor, and sect. 28 (which does apply) contains no such exception. An action to redeem is not, properly speaking, “an action to recover land” within sect. 16, which evidently refers to actions where the rightful owner has been dispossessed.

***In Re The British Seamless Paper Box Company*
(Limited).**

[50 L. J. R., Ch. App. (affirming the M. R.) 497; L. R., 17
Ch. Div. 467.]

The M. R. : If promoters arrange to get a profit for themselves out of what is apparently paid to the vendor, it is immaterial whether the contract with the vendors is approved of by the directors of the company, who are the promoters, just before the allotment of shares or just after. In both cases the intention is to cheat future shareholders, and of course it makes no difference whatever that the persons who, when the allotment was made, were the promoters, or their nominees, knew of the fraud. You can defraud future, as well as actual, allottees. But here the transaction was *bonâ fide*, and the company itself had adopted it with the knowledge of every member of the company, without any intention of bringing in any other shareholder or defrauding any future allottee.

Afterwards five gentlemen who were strangers joined the company. There is a conflict of evidence as to whether they knew of the original agreement effectuated by the *bonâ fide* transactions above mentioned or not. But the subsequent allotment of shares to these five gentlemen was not originally contemplated, the company having been plainly intended to be confined to the American inventors and a few others who advanced capital (eight in all). They alone signed the memorandum of association. This subsequent allotment ought not, therefore, to be held to alter the relations between the company and its vendors. I think that the original unregistered agreement, of January, 1874, between the three owners of the patent and R., whereby R. was to assist them in forming a company to purchase the patent for 32,000*l.*, and R. was to receive 6,000*l.* out of the purchase money in paid-up shares,—although I am satisfied of its *bona fides*,—ought to have been stated in the memorandum of association, and therefore do not give costs. But this application (under

sect. 165) must fail. The allotments which the eight original members chose to make as between themselves and to each other hurted no one outside them. The case of *The Society of Practical Knowledge v. Abbott* (2 Beav. 559) does not apply. There, by the terms of the charter of incorporation, the four persons who obtained it had no right to allot the shares except for cash, and they, having sold the shares to other people, were held to be rightly sued for the balance of cash due on their allotments.

L. J. James : As the M. R. says, the question resolves itself into one of honesty or dishonesty. These men intended to be, and were, the sole members of the company, and sole proprietors of the patent ; the arrangements between themselves concerned them only, and they were the only members of the company at the time.

L. J. Brett : The judgment of the M. R. is founded on this, that at the time this transaction was completed not only every member of the company knew its nature and adopted it, but it was not then intended that any other person should become a member of the company. Therefore there was no secrecy and no "misfeasance or breach of trust" within sect. 165. Of course, when new shareholders are called in shortly after a transaction of this kind, and such transaction is not disclosed to the new shareholders, there would be strong evidence from which to infer fraud.



Rudow v. The Great Britain Mutual Life Assurance Society.

[50 L. J. R., Ch. App. 504 ; L. R., 17 Ch. Div. 600.]

Where judgment, with costs, has been recovered against a principal defendant, and a formal, but necessary, co-defendant, who is entitled to his costs, has been added, the order is now made direct against the principal defendant to pay such costs. The old practice (followed in the Court below)

was to direct the plaintiff to pay the costs and have them over again from the principal defendant.

Sect. 85 of the Companies Act, 1862, giving a judicial discretion as to restraining proceedings after presentation of petition to wind up, applies to an unregistered company. The words "being wound up," in sect. 204, mean "in course of being wound up," and the combined effect of this sect. and sect. 199 is to import into the winding-up of an unregistered company all the provisions of the Act relating to winding-up by the Court. The Court in this case, acting under the discretion given by sect. 85, allowed an execution (for the formal co-defendant's costs) to be proceeded with where, through the laches of the company, they did not provide for these costs as they should have done, and the position of the execution creditor had been materially affected by such laches and the form of the order.



**The Great Western Railway Company v. The
Waterford and Limerick Railway Company.**

[50 L. J. R., Ch. App. 513; L. R., 17 Ch. Div. 493.]

A special Act empowered two railway companies to enter into statutory traffic agreements, but contained no clause authorizing or requiring differences to be referred to arbitration. The two companies entered into a statutory traffic agreement, which contained a special arbitration clause directing that any matters in difference should be referred to an arbitrator to be appointed as thereby directed.

A difference arose as to the manner in which accounts should be taken under the agreement. One company applied *ex parte* to the railway commissioners, under the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), to determine the matter, who thereupon cited the other company to appear before them. Held, on writ for prohibition, that the commissioners had no jurisdiction to determine the matter.

The 36 & 37 Vict. c. 48, s. 8, only applies to the par-

ticular differences which the special or general Act requires shall be referred to arbitration.

The application below was for injunction and prohibition. The M. R. refused the injunction, and the L.JJ. upheld him in that refusal, holding that an injunction does not go, but that a well-founded objection of want of jurisdiction in the Railway Commissioners is ground for setting aside the award when made, or that a prohibition would go.

The M. R. thought he could not overrule *The Stokes Bay Rail. and Pier Co. v. The London and South Western Rail. Co.* (2 Nev. & Mac. 144), and *The Port Patrick Rail. Co. v. The Caledonian Rail. Co.* (3 Nev. & Mac. 189), and so refused the prohibition, while expressing great doubts. The L.JJ. overruled these cases, and made the rule for a prohibition absolute.

Want of jurisdiction in an arbitrator is not a ground for restraining proceedings before him, since the objection can be taken when it is sought to enforce the award.

Robinson v. Pickering.

[50 L. J. R., Ch. App. 527; L. R. 16 Ch. Div. 660.]

The M. R. : The general engagements of a married woman, contracted on the faith of her separate property, bind the property in the sense that the creditor can obtain a judgment against the separate estate, and payment out of it. But the married woman cannot be restrained from parting with her property until the creditor can establish his right by judgment.

Salt v. Cooper.

[50 L. J. R., Ch. App. (affirmed by M. R.) 529; L. R., 16 Ch. Div. 544.]

The M. R. : The receiver of a Court of Bankruptcy has such legal, although not actual, possession from the moment

of his appointment as to render the equitable execution afforded by the appointment of a receiver in a creditor's action, made a quarter of an hour later, ineffectual, notwithstanding prior seizure under the latter, and notwithstanding absence of notice to the creditor of the bankruptcy proceedings or of any act of bankruptcy.

(2.) The receivership in bankruptcy is a good receivership until the receiver is discharged, and it makes no difference that proceedings originally in bankruptcy are afterwards converted into those by liquidation.

(3.) After final judgment and while same remains unsatisfied, a receiver may be appointed, although there is no claim to the appointment of a receiver in the writ, and without issue of a fresh writ. The action is in such a case a "cause or matter pending" within the Judicature Act, 1873, sect. 24, sub-sect. 7.

The L.JJ. upheld the decision (1), and it was not necessary for them to deal with (2) and (3). They held, as had the M. R. held, that the seizure by the (equitable) execution creditor was not "a lawful seizure" so as to be protected under sect. 95.

Chatterton v. Watney.

[50 L. J. R., Ch. App. 535; L. R., 17 Ch. Div. 259.]

A. mortgaged leaseholds to B., C. and D. in succession. E., a judgment creditor of D., obtained a garnishee order against A., attaching all debts due from A. to D., to answer his judgment. Afterwards D. assigned his mortgage to F. B., the first mortgagee, sold the property under his power of sale and paid off himself and C. There remained in his hands a surplus, but not enough to satisfy the claim of the third mortgagee.

The M. R.: The effect of rules 3 and 4, Ord. 45 (1875), is simply that the attached debt is bound in the hands of the garnishee. What is the effect of binding a mortgage debt? By 27 & 28 Vict. c. 112, s. 1, no judgment is to affect any

land until actual delivery in execution. The judgment, therefore, does not affect the leaseholds of which D. was mortgagee, for "land" in the statute includes "*any interest*" in "all hereditaments, corporeal or incorporeal." The service of the garnishee order on the mortgagor does not operate as a transfer of the mortgage.

L. J. Brett: When, in *Ex parte Joselyne* (47 L. J. R., Bank. 92; L. R., 8 Ch. Div. 330), L. J. James speaks of a debt being "absolutely transferred" to the judgment creditor by service of the garnishee order, he must be taken to have spoken only colloquially, and in the same sense as in r. 3, Ord. 45. The word "transfer" is not used in that order.

Eager v. Furnivall.

[50 L. J. R., Ch. 537; L. R., 17 Ch. Div. 115.]

A testator by will made since the Wills Act (1834) devised freeholds to his daughter in fee, for her separate use. She died before him, intestate, but having married and left issue a daughter who was living at testator's death and capable of inheriting the freeholds. Held, that her husband was entitled to an estate by curtesy in them.

The M. R.: *Johnson v. Johnson* (13 L. J. R., Ch. 79; 3 Hare, 157), and other cases following it, have decided that the gift in the above case is to take effect as if the actual death of the devisee had happened immediately after the death of the testator, and with all the consequences. This property was therefore disposable by the will of the daughter, or descended as on her intestacy (as here). The person to take is, therefore, her heir, who, under the Inheritance Act, takes as purchaser. That is clear. In the case of a husband and wife it is not so clear. As to a husband, this being a devise of the legal estate with superadded direction as to separate use (which, as I held in *Cooper v. Macdonald* (*supra*, p. 209), does not affect a devise of the legal estate), the husband would take under his legal rights without those rights

being cut down by the superadded direction as to separate use.

It is settled law that a husband cannot take curtesy in property which was the fee simple of the wife in possession unless there has either been entry or something equivalent to entry—such as a receipt of rent—to entitle the wife to be described as being seised in fee of the property. If it descends to the wife, for instance, and the husband does not enter in her right before her death, he does not get an estate by the curtesy; the reason is, that it is considered to be the husband's own fault for not entering. He had an estate during the coverture, and he has not taken due advantage of his opportunities of becoming seised. But where he cannot, from the nature of the estate, become seised, a seisin in law is sufficient, and he is not deprived of his curtesy where he could not, by any act of his own, have obtained legal seisin.

Now here the husband could not have obtained seisin. The effect of the Act is as if the wife had died a moment after her father. During that moment the husband could not have obtained seisin. There was not time enough. See Co. Litt. 29, a. where it is said that "Littleton intendeth a seisin in deed *if it may be attained unto.*" And so he goes on to speak of the case of an advowson or rent in fee where the wife, before the church becomes vacant, or the rent due, dies. "She had but a seisin in law, and yet he shall be tenant by the curtesy, because he could by no industry attain to any other seisin. *Et impotentia excusat legem.*" That exactly applies here.

[Counsel *arguendo* refers to the M. R.'s decision in *Pickersgill v. Rodger*, L. R., 5 Ch. Div. 163, as showing that the property fell to the daughter so as to enable her to dispose of it.]

COMMENT.

As to cases coming within the Married Women's Property Act, 1882, the same reasoning applies, as that statute does not affect the husband's rights on intestacy of his wife. In the argument reference is made to the case of *Pearce v. Graham* (*ante*, p. 211), in which V.-C. Kindersley held that, notwith-

standing the fiction as to survivorship created by sect. 33 of the Wills Act, a legacy coming under the terms of that section was not acquired *during the coverture*, within the meaning of a covenant to settle property so acquired. The Act could not prolong the coverture. But if the parent's will itself contains a direction that the share of a daughter, if she survives, shall be subject to the trusts of her marriage settlement, that must have effect. (*Re Hone's Trusts*, ante, p. 211.) The observations in the note to *Cooper v. Macdonald* apply strongly, having reference to these recent decisions. The statutory separate use, under the Act of 1882, may operate differently from the equitable separate use. Formerly, where no trustee was intervened, the husband was deemed to be the trustee for the wife. (*Parker v. Brooke*, 9 Ves. 583.) Now, the fiction is that the *feme covert* is "as if a *feme sole*." This appears to give her the full legal as well as equitable interest. The necessity for acknowledgment in case of a separate use arose from the fact that there was without it no power over the legal remainder in fee. (*Prideaux Conv.* 8th ed. p. 182.) The 1882 Act seems to give such a power.



In re E. Warner's Settled Estates, Warner to Steel.

[50 L. J. R., Ch. 542; L. R., 17 Ch. Div. 711.]

The proviso in the 42nd section of the Succession Duty Act, which, on a sale of settled real estate, transfers the duty from the property sold to that acquired in substitution for it, and charges it in the meantime upon the successor's interest in the sale moneys, applies to a sale under the Settled Estates Acts as well as to a sale under a power in a settlement. Consequently, in either case, the purchaser is discharged from liability to succession duty.

In fact, sect. 22 of the Settled Estates Act, 1877, expressly says that the conveyance executed thereunder by the person directed by the Court "shall take effect as if the settlement had contained a power enabling such person or persons to effect such sale, and so as to operate (if necessary) by way of revocation and re-appointment of the use."



Thomas v. The Patent Lionite Company.

[50 L. J. R., Ch. App. 544; L. R., 17 Ch. Div. 250.]

The M. R. : The result of the decisions as to the cases in which, having reference to sects. 163, 85, and 87 of The Companies Act, 1862, a landlord ought to be allowed to distrain after the winding-up is that the discretion ought, generally, to be exercised in his favour when he cannot prove for his debt but not when he can. Here the landlord could prove. The 10th section of The Judicature Act, 1875, does not import this right of distress as it would be in bankruptcy under sect. 34 of The Bankruptcy Act, 1869. The landlord is not a secured creditor within the section. He has merely a power of levying a distress. True that the bankruptcy rule is to prevail "as to debts and liabilities provable," and that rent is a provable claim. But the section does not import into a winding-up the bankruptcy rules giving preferential payment to certain debts. It applies to those who will get dividends, not to those who will be paid in full.

COMMENT.

And see *Ex parte Clemence, re Carriage, &c., Co.*, 52 L. J. R., Ch. 472 and L. R., 23 Ch. Div. 154. As to poor rates and local board of health rates made after the winding-up, the Court will, under sect. 163, only order payment in full where the liquidator has had beneficial enjoyment for the purposes of the company. (*In re Watson & Co.*, L. R., 23 Ch. Div. 500.)

**Lyon v. Tweddell.**

[50 L. J. R., Ch. App. 571; L. R., 17 Ch. Div. 529.]

The M. R. : This action is to obtain a decree for dissolution on the purely equitable ground that from incompatibility of temper it is desirable to dissolve it. It is not to carry out or enforce any of the partnership articles [which contained no provision for dissolution]. In such a case the dissolution should operate from the date of judgment.

[James, L. J. : This applies only where the dissolution is

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sought for misconduct not arising under the partnership articles. We adopt the rule of Lord Cottenham in *Besch v. Frolich* (12 L. J. R., Ch. 118; 1 Ph. 172), which was the case of a dissolution on the ground of lunacy of one partner.]

COMMENT.

Where the misconduct on which the dissolution is based is in respect of any breach or misfeasance of the articles or partnership contract, the dissolution operates from date of issue of writ. (*Kirby v. Carr*, 3 You. & C. Exch. 184; *Shepherd v. Allen*, 33 Beav. 577.)

In re The Birmingham and Lichfield Junction Railway Company.

[50 L. J. R., Ch. 594; L. R., 18 Ch. Div. 155.]

In order that, under The Railway Companies Act, 1867 (30 & 31 Vict. c. 127, ss. 4, 31, 35), a judgment creditor of the company who has obtained a charging order on the parliamentary deposit may obtain the appointment of a receiver, and an inquiry as to the claims of landowners and others injured by the company's exercise of their compulsory powers, there must be an "undertaking" within the meaning of sect. 4, of which the receiver is to be appointed. There was a Legislative intention that these *bona fide* debts should be paid; but a condition was imposed that there must be either a winding-up order or a receiver. There is neither here. The company has neither a railway nor any other property. The sum of money paid in by the promoters never was part of the assets of the company. It is suggested that the receiver may get some money from calls; but the 4th section was not intended to preclude the remedy in the nature of a *scire facias* as to these, nor does a receivership extend to unpaid calls. The only other mode in which the deposit could be made available is under a winding-up after a Board of Trade warrant of abandonment, under The Abandonment of Railways Act, 1850, as amended by The Railway Companies Act, 1867, and The Abandonment of Railways Act of 1869. Here the

Board of Trade have declined to grant a warrant. If they have not power they ought to have it given to them by the legislature.

In re **Wade and Thomas (Solicitors).**

[50 L. J. R., Ch. 601; L. R., 17 Ch. Div. 348.]

A mortgagee or transferee of a mortgage who is being paid off has a right, until the transaction is completed, to keep one fair copy only of the deed of re-conveyance or transfer, and to charge the mortgagor for making it. But on payment off he is bound to hand over that copy and all other copies of documents relating to the property in his possession as mortgagee.

Ex parte **The Merchant Banking Company of London,**
In re **Durham.**

[50 L. J. R., Ch. App. 606; L. R., 16 Ch. Div. 623.]

Resolutions for composition, under sect. 28 of The Bankruptcy Act, 1869, differ from proceedings under sect. 126. The former are subject to the exercise of the judicial discretion of the judge before whom the scheme comes for approval, and such judge should carefully listen to objections of dissentient creditors.

Walter v. Howe.

[50 L. J. R., Ch. 621; L. R., 17 Ch. Div. 708.]

A newspaper is a "periodical work" or "book" within sect. 18 of the 5 & 6 Vict. c. 45, and must be registered in order to confer on the proprietor a copyright in its contents and a right to sue in case of piracy thereof. Moreover, the proprietor of a newspaper which is duly registered cannot

sue without the author, unless such proprietor has bought from the author and is entitled to the copyright.

I decline to follow *Cox v. The Land and Water Journal Co.* (V.-C. Malins), 39 L. J. R. Ch. 152 ; L. R., 9 Eq. 324.

In re Gosman.

[50 L. J. R., Ch. App. 624 ; L. R., 17 Ch. Div. 771.]

This was a petition of right to obtain an order for the Crown to pay interest on a fund in the hands of the solicitor to the Treasury as the property of an intestate to whom, however, the Crown had not administered. It was alleged that in 1875 the Crown had notice of the claim.

The M. R. : There is nothing to be said. The Crown never administered. Why should it pay interest ? Our law does not allow it except under statute, by contract, or the law merchant.

In re Knapman's Estate, Knapman v. Wreford.

[50 L. J. R., Ch. App. 629 ; L. R., 18 Ch. Div. 300.]

The M. R. : Certain legatees commenced an action in the Probate Division to recall probate of the will granted to the defendant executrix, and to obtain administration themselves. They failed, and became liable to pay the costs of that action. Those are costs which the executrix can recover from them as part of the testator's estate. Pending that litigation, but before judgment, the legatees assign their legacies. These assignees took subject to all the liabilities of the legatees (assignors) in respect of the legacies. Amongst these is the liability to pay the costs of the probate action. No legatee can take anything from the estate until he pays what is due from him to the estate. The payment of the legacy into Court in no way alters the position of the parties.

Patman v. Harland.

[50 L. J. R., Ch. 642; L. R., 17 Ch. Div. 353.]

The first question is as to the notice which a man who takes a lease has of his lessor's title. It has been settled for more than a century that he has constructive notice of his lessor's title, which means that the man who takes a lease is in a similar position as to constructive notice as a man who buys a fee simple. Both are bound to investigate the title in the usual manner, and to make reasonable inquiries. The lessee must ask for the conveyance to the lessor, and a fair deduction of title. Here the actual conveyance to the lessor discloses this restrictive covenant. If it had not shown it, the conclusion would have been the same. It is said that, granting the constructive notice, a contrary statement by the lessor—*i. e.*, that there is no such restrictive covenant—will in equity avoid the effect of the notice. I dissent. It is no excuse that you were told that: a deed which forms part of the chain of title, and of which you had notice, contained nothing necessitating perusal of it. It was your duty to read it. There is a class of cases, *Jones v. Smith* (11 L. J. R., Ch. 83, and 12 L. J. R., Ch. App. 381; 1 Hare, 43, and 1 Ph. 244) being the most notorious, in which it is laid down that where a person is told of a deed which may or may not affect the title, and is at the same time told that it does not affect the title, such person is not to be deemed to have constructive notice of the deed—*e. g.*, if you buy land from a married man, and you are told that there was a marriage settlement but that it does not affect the land, you have no constructive notice of the deed. A settlement may or may not so affect land. If every settlement necessarily affected it, the case would be otherwise. But you are not bound to assume an improper suppression of the settlement contrary to the statement to you. But that principle does not apply where you know a deed does affect the land, but can only know the extent to which it so affects it by a reference to the deed.

One observation of L. J. Turner, in *Wilson v. Hart* (35 L. J. R., Ch. 569; L. R., 1 Ch. 463), countenances somewhat the contrary doctrine. It is that if an actual representation to the tenant had been made that the property was not subject to the restrictive covenant there in question, he considered that equity ought not to have enforced the covenant against the tenant. That is incorrect.

Carter v. Williams, 39 L. J. R., Ch. 560; L. R., 9 Eq. 678, confirms my view. V.-C. James there means that the deed containing the restrictive covenant was not there noticed either by way of recital or by reference in the conveyance, so that a person might get a complete chain of title without notice of the collateral deed of covenant. It is rather on the doctrine of *Jones v. Smith*, the fact of omission of all reference to the deed of covenant in the abstract being (*quoad* the purchaser) tantamount to a statement that it did not exist.

The Vendor and Purchaser Act, 1874 (sect. 2), does not alter this rule. All that it does is to make an express stipulation necessary before the lessor's title can be called for by the purchaser. Formerly the law was otherwise.

The doctrine of *Tulk v. Moxhay*, 18 L. J. R., Ch. 83; 2 Ph. 774, applies.

COMMENT.

The Conveyancing and Law of Property Act, 1882 (sect. 3), contains the amended provision, supplementary to the Vendor and Purchaser Act, 1874. Neither Act applies to a lease for lives. (See Wolstenholme and Turner's Conveyancing and Law of Property Act, 1882, pp. 7 and 14, 2nd ed.).



In re The Campden Charities.

[50 L. J. R. Ch. App. 646; L. R., 18 Ch. Div. 310.]

The M. R.: The scheme is made in pursuance of the *cypres* doctrine. The property has increased enormously in value, and all the circumstances have changed.

As to Lord Campden's will there is no question at all. [It was dated in 1629, and contained a gift of 200*l.* "to be yearly employed for the good and benefit of the poor of the town of K., in such manner as certain specified persons and the churchwardens of the parish of K. from time to time should think fit to establish for ever."'] The argument chiefly has been as to the will of Viscountess Campden. She gives 200*l.* to be laid out in land to produce 10*l.* a year upon trust that the trustees (the parishioners and churchwardens of K. for the time being) shall apply the rent thus: "One moiety from time to time for ever for and towards the better relief of the most poor and needy people that be of good life and conversation within the said parish of K., and the other moiety . . . shall be applied yearly for ever to put forth one poor boy or more, being of the said parish, to be apprenticed; and the 5*l.* due to the poor to be paid to them half-yearly for ever, at Ladyday and Michaelmas, in the church or the porch thereof at Kensington." The 5*l.* a year have now come to 1,100*l.* a year. It is said we must apply that in the same way as the 5*l.*; that is, to apprentice as many poor boys as it will apprentice. Apprenticeship was then compulsory (5 Eliz.); so the law remained until 54 Geo. 3. The founder did, therefore, desire an apprenticeship *per se*, but only as a necessary means of affording a livelihood. Apprenticeship is now comparatively obsolete. A sufficient part may be expended in apprenticing boys at the trustee's discretion, and the rest either in apprenticing others as the necessity arises, or in any other similar purposes for the poor of the parish. As to the "doles," they are mischievous in operation. Of course the founder never intended, say, 500*l.* to be distributed in small coins. She only spoke of 50*s.* The trustees have given the money to pensioners elected by them, continuing the payments during good behaviour. This is not right. The payments contemplated were not permanent in nature, but casual. Moreover, such recipients were not the most poor and needy. [The Charity Commissioners had in 1879 settled a scheme whereby in effect one moiety of the entire

income was applied to the education of children in K., attending public elementary schools, and this was upheld by the Appeal Court.]

Ex parte **Walton**, *In re* **Levy**.

[50 L. J. R., Ch. App. 657; L. R., 17 Ch. Div. 746.]

The M. R.: "In construing wills, and indeed statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of that instrument. In that case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further." *Grey v. Pearson*, 26 L. J. R., H. L. (Ch.) 473; 6 H. L., Ch. 61, per Lord Wensleydale. Lord Blackburn, in *The Caledonian Rail. Co. v. The North British Rail. Co.* (L. R., 6 App. Cas. 114), calls that "the golden rule for construing all written engagements."

This question arises under sect. 23 of the Bankruptcy Act, 1869. The object of this section was that a bankrupt was not to remain liable for engagements attaching to his property, and that the trustee should not be compelled to acquire the property with the liability. No confiscation beyond this was intended. The section must be read as if thus qualified: "but not so as to affect *the rights of third parties*." In this case a lease had been granted by W. to L. for ten years at 70*l.* a year. A few days after L. sublet to M. for nine-and-a-half years at 56*l.* a year. L. filed his petition, and his trustee obtained leave to disclaim the lease. The Court held that the disclaimer did not affect W.'s right as against M. to receive the rent reserved by and to enforce the covenants contained in the original lease. Leave was given to M. to prove against L.'s estate for his loss from liability to pay the higher rent.

[L. J. James: The lessor's right is double: (1) *In personam*, on the contract, (2) *in rem*, by distress, or by re-entry under

the proviso. On a sub-demise the sub-tenant is not liable on the contract, but he takes subject to all the lessor's rights *in rem*.]

COMMENTS.

The right course is that the trustee should apply for the leave of the Court, under Bankruptcy Rules, 1871, r. 28 (see now 46 & 47 Vict. c. 52, s. 55, sub-s. 4), and then the Court can and will impose proper terms in favour of the said parties and all concerned. See *Ex parte Ladbury, re Turner* (L. R., 17 Ch. D. 532; 50 L. J. R., Ch. App. 838).

L. J. James also here lays down the following principle:—

The Court is bound to ascertain for what purposes, and between what persons, a statutory fiction is to hold, when the truth is that the act thereby deemed to be done has not been done, and to confine the operation of the fiction to these purposes and persons.

The same principle seems applicable to common law and equity fictions.

The observation was applicable to this particular sect., because it says the disclaimer shall operate as a surrender. If we codified our law this forgetfulness of pre-existing law, when amendments are made, would not arise.

Another instance of the "statutory fiction" is that created by sect. 33 of the Wills Act, and an instance of the application of the principle mentioned by L. J. James is given in *Pearce v. Graham* (*ante*, p. 211, and L. R., 19 Ch. D. 612), a decision on that section. See also the very peculiar case of *In re Hensler, Jones v. Hensler* (51 L. J. R., Ch. 303) under this section. Again there are the cases where, notwithstanding the statutory provision that a will shall speak from the death of the testator, it has been construed, where justice required, to speak from the date of the will.

Another very recent instance is afforded by the Married Women's Property Act, 1882, which gives the fictional status of a single woman to a married woman so far as the holding, acquiring, and disposing of property are concerned. The alteration of the status of the married woman by this fictional position has, however, the effect of ending many other fictions connected with her status as a married woman. The fictions contained in old maxims, such as "the law regards not fractions of a day," are scarcely reliable in any sense, nowadays. See *Salt v. Cooper, ante*, as to the value of a quarter of an hour. Probably minutes are more in modern commerce and events than days were when the maxim was written. [*Ex parte Walton* (*supra*) was followed by the Queen's Bench Division in *Harding v. Preece* (51 L. J. R., Q. B. 515; L. R., 9 Q. B. Div. 281).]



Gathercole v. Smith.

[50 L. J. R., Ch. App. (affirming the M. R.) 671 ; L. R.,
17 Ch. Div. 1.]

The M. R. held that the Incumbents' Resignation Act, 1871 (34 & 35 Vict. c. 44, s. 10), was to provide for incumbents an inalienable provision, and that, therefore, a retired incumbent could not, by set-off pleaded, be made to allow to the new incumbent out of the pension, the amount of a judgment debt recovered against the retired incumbent prior to his retirement. The provision in sect. 10 is that "such pension shall not be transferable at law or in equity."

L. J. James : There is no ground for dissenting from the M. R. "Transfer" is one of the strongest words which can be used, and was intended to prevent voluntary dealings and transfers, *in invitum*, by operation of law. L. J. Lush : The word "assigns" in the act does not create any difficulty, as after the instalments of pension are due, the incumbent might assign them to his butcher, or baker, or other person to whom money is due. The word is collocated with "executors or administrators."

In re Jones, Ex parte Jones.

[50 L. J. R., Ch. App. 673 ; L. R., 18 Ch. Div. 109.]

The M. R. : I entirely dissent from *Ex parte Lynch* (45 L. J. R., Bank. 48 ; L. R., 2 Ch. Div. 227), which is now to be considered overruled.

Neither mere trading nor filing a liquidation petition will alter the legal status of an infant, who is not liable to be adjudicated a bankrupt. If an infant expressly represents to his creditors, and induces them to believe that he is of full age, and after attaining twenty-one he becomes bankrupt, the persons defrauded can prove in the bankruptcy for the equitable liability.

In re Pigott and the Great Western Railway Company.

[50 L. J. R., Ch. 679; L. R., 18 Ch. Div. 146.]

Where a railway company has given notice to treat, and the price has not been paid, there is a contract enforceable in equity with all ordinary consequences. The purchaser ordinarily pays interest from the time at which he might prudently have taken possession if offered to him, *i. e.*, at the time when a good title is shown. These same principles apply to purchases by railway companies under their statutory powers.

In re Brown's Settlement, In re Brown's Will.

[50 L. J. R., Ch. App. 724; L. R., 18 Ch. Div. 61 (read with (2) *Dawson v. Oliver Massey*, 45 L. J. R., Ch. App. 217 & 519; L. R., 2 Ch. Div. 753).]

The case first above mentioned was before James, Baggallay and Lush, L.JJ., and the second was decided by James, Mellish and Baggallay, L.JJ.

(1) L. J. James: *Dawson v. Oliver Massey* was felt to be a very strong case. The M. R., a great authority on these questions of construction, felt that our decision was a violation of the first principles of English law, that is, that a gift upon a condition precedent could stand if the condition precedent were not performed. He said he could not so decide. We there held that a consent of both parents to a marriage was satisfied by the consent of a surviving parent. I am reported to have said that the same principle would apply if both the parents had died. We considered the special circumstances and the intention before we placed a construction on the will which the M. R. considered impossible. Moreover, there it was utterly impossible to supply the want of a parent or parents. Here the consent required, both in the settlement and the will, is that of the *guardian or guardians*. There was no impossibility and no difficulty in supplying, by fresh

appointments by the Court of Chancery, the office. Consequently it would be an unwarrantable extension (if it could be so called) of *Dawson v. Oliver Massey* to hold that a child could take here without the consent of a proper guardian for the time being. A guardian appointed by the infant would not do.

COMMENT.

The above affords a striking example of the general accuracy of the views of the M. R. *Dawson v. Oliver Massey*, as decided originally by the M. R., would probably be restored as the correct decision. "Hard cases make bad law."

Eames v. Hacon.

[50 L. J. R., Ch. App. 740; L. R., 18 Ch. Div. 347.]

De La Viesca v. Lubbock (10 Sim. 629) is precisely in point, and is correct in principle. The principal (Irish) administratrix rightly sued a limited (Indian) administrator for a surplus admitted to be in the hands of his English agents.

Wormald v. Muzeen.

[50 L. J. R., Ch. App. 776; 45 L. T. (N. S.) 115; 29 W. R., 795.]

A testator devised his real estate and bequeathed his residuary personal estate on trust, in the first place, out of the rents and profits thereof, to pay his widow the clear annual sum of 300*l.* during her life, and to pay the remainder of such rents and profits to his sister during her life, and after her decease, as to the trust estate in trust for all the children of his said sister as tenants in common.

The M. R.: The question is what is to be attributed to this testator as his complete intention when the will contains only an imperfectly-expressed intention. The scheme of the will is that the widow is to take an annuity out of the income,

and the sister is to take the remainder of the income. But the income proves to be insufficient to satisfy even the annuity to the widow. The testator gave the remainder of the income to his sister, and therefore contemplated a surplus. Therefore arrears of the annuity are not a charge upon the *corpus*, for it evidently never occurred to the testator that it would be wanted. I decline to go into decided cases.

The Attorney General v. The Birmingham Tame and Rea District Drainage Board.

[50 L. J. R., Ch. App. 786; L. R., 17 Ch. Div. 685.]

A perpetual injunction against a sanitary authority does not continue as against a newly-constituted authority succeeding the first. The injunction is merely against the then authority, their workmen and agents, and does not run with the land. A new owner or purchaser committing the like nuisance as was then restrained can and must be subjected to a fresh action.

Wheeler v. Le Marchant.

[50 L. J. R., Ch. App. 793; L. R., 17 Ch. Div. 675.]

The protection of "privilege" is very limited. Communications by a patient to his doctor with respect to the probable origin of a disease from which the patient suffers are not privileged. Those to a priest in the confessional are not privileged, neither are those to a friend on delicate matters of reputation and honour. The protection is restricted to the communications in obtaining the assistance of lawyers as regards the conduct of litigation or the rights of property. The actual communication to the solicitor or his clerk, whether by the client or his agent, is privileged. The evidence obtained by the solicitor or the client at his instance, after litigation threatened, is privileged. But if a solicitor is con-

sulted about a matter as to which no dispute has arisen, and the solicitor asks for further information from third persons before he advises, the information so obtained is not privileged.

Freme v. Clement.

[50 L. J. R., Ch. 801 ; L. R., 18 Ch. D. 499.]

A power of appointment is a power of disposition given to a person over property not his own, by someone else, who directs the mode in which the power shall be exercised by a particular instrument. I consider that the donor of the power must mean it to be exercised according to the law (for the time being) governing that particular instrument. If, for instance, the power required a deed, and the person exercising it appointed by deed to A. B. simply, without words of limitation, A. B. would take for life only. If, on the other hand, by power created since the Wills Act, the appointment in this case was to be by will, a will as above would give A. B. the fee. By another illustration, a gift of freeholds, even under the old law, by deed, to A. and his issue, would not create an estate tail, but by will it would.

Here the instrument creating the power was dated before the Wills Act, and the power is exercisable by deed or will. "A will" means such a will when executed—*i. e.*, at time of appointment thereby. If the law changes after creation of the power the donor has himself pointed out the time of exercise of the power as that by which the law of execution is to be guided. Then there is no difference between the rules as to execution and those of construction. Both are to be those in force at the time of execution of the power. Then the Wills Act alters the law as to wills made in exercise of powers as well as other wills. The words "devise" and "bequeath" are not strictly limited to either real or personal estate. The words "devise" and "residuary devise" in the Wills Act (sects. 15, 25) will include devises by way of appointment under a special or general power of appoint-

ment. Therefore a devise which is void *quā* original devise in execution of a power will pass the property devised to the residuary devisee under sect. 25, if such residuary devisee is an object of the power.

Dicks v. Yates.

[50 L. J. R., Ch. App. 809; L. R., 18 Ch. Div. 76.]

The M. R.: If an order directs the whole costs to be paid by a defendant to a plaintiff, and nothing more, an appeal from the order is not an "appeal for costs" within sect. 49 of the Judicature Act, 1873. A necessary inference from the order that the defendant do pay the costs is a decision that the plaintiff had a right to sue. From that decision an appeal lies.

The plaintiff has a serial called "Every Week," in which he publishes novels or novelettes, with pictures. The defendant is the proprietor of a weekly newspaper called "The World," of a totally different character from the plaintiff's serial, but occasionally containing novels. The suggestion is that because the plaintiff had published a complete novel called "Splendid Misery," by one Hazlewood, in "Every Week," the defendant, by publishing in "The World," a feuilleton—that is, a chapter of a novel—under the title "Splendid Misery," by Miss Braddon, has thereby injured the plaintiff. That is impossible. There is no substance in the action.

The plaintiff claims copyright in the words "Splendid Misery" as a portion of the title of his novel. The defendant objects to the registration, as the first number only of "Every Week" containing the commencement of the story was registered, and the story had been published as a whole when this was done. There is nothing in that objection.

There is no copyright at all in this combination of words. There is actual evidence that a novel under the very title was published in 1801. There is no more invention in the words "splendid misery" than in the words "miserable

sinner." If the words were new, as combined, they would not be an "invention." They might amount to a trademark, but not copyright. Copyright only applies to original work. If you go by analogy to the patent law prior publication in England defeats the claim. So here. At the very least *re-invention* would have to be strictly proved. Here there is no evidence of it, while there is evidence of prior publication.

L. J. James: Literary property is subject to invasion in three modes—(1) An open and avowed trespass, where a publisher in this country publishes an unauthorized edition of a copyright work, or introduces and sells in this country a reprint made abroad; that is open piracy; (2) Where the falsely-pretending author of a book illegitimately appropriates the fruit of a previous author's literary labour. That is literary larceny. Against (1) and (2) the Copyright Act protects; (3) Where a man is selling a work under the name or title of another man; that is a common law fraud, irrespective of and anterior to any copyright legislation.



In re **Greaves, Bray v. Tofield.**

[50 L. J. R., Ch. 817; L. R., 18 Ch. Div. 551.]

The M. R.: The debt on which the claim is made was incurred 11th November, 1873. The writ in this (executor's administration) action was issued 30th December, 1878, and judgment was pronounced 8th December, 1879. This claim was brought in after judgment. Unless the administration action saved it, therefore, the claim is barred. This is an action by one executor against the other, and not an action on behalf of all the creditors. The judgment would have saved the claim had it been pronounced before the expiration of six years from 11th November, 1873. There being no pretence for saying that the action was brought for present claimants, there is no reason for getting rid of the Statute of Limitations.

Sterndale v. Hankinson (1 Sim. 393), decided in 1827, was approved by Lord St. Leonards. But (1) it has no operation here, and (2) creditors should not, in future, rely on it. The decision depended on a variety of circumstances, of which none now exist. (1) Then the Statute of Limitations did not apply in courts of equity. Now it applies in this and other branches of the High Court. (2) So far as personal estate is concerned it is no longer the practice for one creditor to bring an administration action on behalf of others. The 1852 Act enables the creditor to get the decree for administration of the personal estate. But as the Act does not apply to real estate unless it has been ordered to be sold, or there is a trust or power for sale, the practice still prevails where there is real estate to be administered. (3) The reason for the decision no longer exists. You can, by summons, get a decree in two days, if there is a debt at all. The rule *cessante ratione legis cessat ipsa lex* applies. This plaintiff might, years since, have taken out a summons. It is only when the debt is nearly barred at the debtor's death that a creditor cannot wait, so that the V.-C.'s observations as to the exercise of the Court's discretion in favour of the creditor no longer apply.

Truman v. Redgrave.

[50 L. J. R., Ch. 830.]

If a mortgagor of business premises, *e. g.*, an hotel, prevents his mortgagee from taking possession, the Court will, at the instance of the mortgagee, appoint a receiver and manager, and grant an injunction to restrain interference with the management of the business or possession of the premises.

In re Morgan, Pillgrem v. Pillgrem.

[50 L. J. R., Ch. App. 834 ; L. R., 18 Ch. Div. 93.]

The M. R. : The executor here was appointed with directions under which he became in effect trustee of the late testator's business, which the executor was to carry on, accounting for the profits to the *cestui que trusts*. The will was proved in September, 1870. The trustee did not sell the property, but continued to carry on the business as directed by the will. In 1876 he surrendered the lease of the business premises, and took a new lease of them for a longer period, and also of two adjoining cottages, and continued to carry on the business in them. The renewed lease would not have been granted but for the surrender. As a trustee can get no personal benefit from a dealing with the trust property, it must be held that he was trustee of the new lease. In 1879 he borrowed a sum of money from the appellant in his own name, and for his own use in carrying on the business, and deposited the lease as security. The appellant had no notice that the trustee was not the legal owner of the property comprised in the lease. Had he inquired into the landlord's title he would not have got any such notice. He was therefore a purchaser without notice, but who did not get the legal title, and therefore he must take subject to prior equities ; that is, to the trust on which it was held. Then he issued execution against his debtor's chattels, and, amongst them, this leasehold interest. In order to enable the sheriff to seize, the lease was handed to him. Trust property cannot be seized under a *fi. fa.* for debt of the trustee. The execution gave no legal title to the property. He got *no* legal title, and his equitable interest is to be postponed to the claims of the *cestui que trust*.

**The Cercle Restaurant Castiglione Company
v. Lavery.**

[50 L. J. R., Ch. 837; L. R., 18 Ch. Div. 555.]

If a company is proved to be solvent, a creditor's petition, founded on a debt as to which there is a *bonâ fide* dispute, to wind up, may be restrained by injunction.

**Peters v. the Lewes and East Grinstead Railway
Company.**

[50 L. J. R., Ch. App. 839; L. R., 18 Ch. Div. 429.]

The M. R. : The first point is as to the time during which a power of sale, given by will, can last. You cannot have a power of sale, the exercise of which will change interests, so limited as to exceed the time prescribed by the rules against remoteness or perpetuity. The Courts have decided that powers, although framed in general terms, are limited by the nature of the limitations contained in the settlement or will, so that when, by expiration or cesser of the limitations in the settlement (whether by will or deed), the absolute interests come into existence, then the power is considered to be at an end. Inasmuch as all valid settlements are limited to the prescribed periods, the powers contained in them are, therefore, valid. That doctrine is established by *Lantsbery v. Collier* (25 L. J. R., Ch. 672; 2 K. and J. 709), and a long line of cases. But that does not apply to cases where the power is only to take effect contemporaneously with the coming into existence of the absolute limitations. To put it in other words, it does not apply to a power where there is nothing but absolute limitations of interests given in the first instance. If a man, having a dozen children, gave all his real and personal property to trustees upon trust to divide amongst such children, and, to make such provision, empowered them to sell, the power is

valid. The division is to be made within a reasonable time. If they postpone too long, without express power to postpone, there is a breach of trust. Twenty-one years would be an unreasonable time to wait in such a case. So if there were a prior life estate in the widow (as here), and then a direction to sell and divide amongst the twelve children, the power of sale incident would be equally valid; and not the less so because all the children might have attained twenty-one. Of course if all the children, not under disability, take a conveyance from the trustees, the trust is ended, and so is the power. Or they might direct a conveyance to a purchaser. Here, I think, the power was not to be exercised until the death of the widow. [The residuary devise and bequest in question was to trustees upon trust for the wife for life, and after her decease to pay, transfer, assign, or assure the same unto the testator's two daughters, in equal shares, for their separate use, as tenants in common, with a substitutional gift over in favour of the issue of the daughters in certain events which did *not* happen, and "for the purposes of division" the testator thereby empowered his trustees to sell his residuary estate.] For the purpose of division amongst whom? Between anyone who is entitled to division, *i. e.*, whether the two daughters or one daughter and the children of the other.

A general power exercisable at any period would be bad; but this I think good. Here there was no exercise of the power for—(1) The whole of the transaction began before the power was exercisable. The first notice to treat was given in the testator's lifetime; it was after his death, but in the lifetime of the tenant for life (his widow) that the trustees called on the railway company to take the property. That could not be under the power. Then the action was instituted and the money paid into Court. Then the tenant for life died. I agree that, although the transaction began without reference to the power, yet if it came into existence only at the death of the tenant for life, the trustees could still make a title under the power. But this was not attempted. They

professed to act under the powers of the Lands Clauses Act, 1845. They did not intend to convey anything except under the Act of parliament. The conveyance thereunder would not, for instance, pass the minerals unless mentioned. Now trustees reserving minerals can only do so in the terms of the Special Act (25 & 26 Vict. c. 108). They did not then intend to exercise the power.

If trustees sell under the Lands Clauses Act they may agree to sell at such a price *as shall be fixed by two surveyors, and as shall be afterwards adopted by them*. A contract to adopt the judgment of others would not bind, but if they afterwards [exercise their own judgment on the report and] approve, that will do.

As regards clause 7 of the L. C. C. Act there is no distinction between a trustee for a married woman absolutely entitled for her separate use, and not restrained by anticipation, and a trustee for a man [who is *sui juris*]. It is to a trusteeship for a *cestui que trust under disability* that the clause has reference. The trustee cannot convey so as to bind a *cestui que trust*, who is *sui juris*. Trustees cannot, under sect. 9, appoint one of themselves (a surveyor) to value. The nomination of a valuer is intended to be a check upon the price fixed by the person who has the power of sale.

Holroyde v. Smith.

[45 J. P. 437.]

A solicitor can only withdraw one bill and deliver another, when he can prove—(1) mistake; (2) accident; (3) insertion of items through a misrepresentation. (*Re Heather*, L. R., 5 Ch. App. 694, followed.)

Marginal note in *Re Chambers* (34 Beav. 177) corrected. The M. R. there only held that there must be *special circumstances* to warrant a re-delivery.

In re Harris, Ex parte Graves.

[51 L. J. R., Ch. App. 1; L. R., 19 Ch. Div. 1.]

The M. R.: A convict is liable to pay his debts. The Felons Act, 1870 (33 & 34 Vict. c. 23), expressly reserves to every creditor right to issue execution as before (sect. 27). The convict may be made a bankrupt if he does not pay. The power of the Crown to intervene and appoint an administrator is for the benefit of the convict and his family, and does not affect the rights of the convict's creditors.

In re Coltman, Coltman v. Coltman.

[51 L. J. R., Ch. App. 3; 45 L. T., N. S. 392.]

The M. R.: The trustees of a friendly society are by the Act of 1875 empowered, with certain consents, to lend the funds of their society on certain securities, "not being personal securities." This only makes the lending contrary to the provision—*e. g.*, on promissory notes, as here—a breach of trust. The loan is not, *per se*, illegal, and therefore this action against the borrowers must prevail. I am not satisfied that even if the statute had expressly prohibited such loans, the prohibition would have made any difference. It would be wrong, and liable to be treated as an appropriation of the funds to the trustee's own use. But it is not illegal to lend or to recover the money back to the purposes of the society. The trustees must be competent to redress a wrong. How the borrowers can set up the doctrine of illegality as a defence to a claim for repayment I cannot understand.

In re The Great Britain Mutual Life Assurance Society.

[51 L. J. R., Ch. App. 10; L. R., 16 Ch. Div. 246.]

The M. R.: The form of the arrangement made upon the establishment of this [unregistered] society and its substance

is, that the policy-holders shall pay the premiums on their policies and no more. Out of the moneys so received current expenses are to be paid, and out of the surplus the policies are to be paid as they become claims. If the policy-holder likes to surrender his policy he can do so. The only question, in insolvency and winding-up of the company, is in what proportions, after payment of costs, the funds shall be distributed amongst the policy-holders. Under sect. 21 of the Life Assurance Companies Act, 1870, the Court can wind-up such a company as this under the Companies Act, 1862. If the society dispute the validity of a particular policy the onus is on the society. If a large number of policy-holders desire the dismissal of the winding-up order, and, in lieu, an order under sect. 22 of the above Act (33 & 34 Vict. c. 61), for reduction of contracts, the Court will order accordingly if the necessary majority so wish, and will adjourn the winding-up proceedings for such reasonable time as will enable the real wishes to be ascertained.

Collyer v. Isaacs.

[51 L. J. R., Ch. App. 14; 30 W. R. 70.]

The M. R. : A debtor executed a mortgage security to his creditor, which contained in form an assignment of all future chattels which should be brought in certain premises. Then the debtor liquidated and obtained his discharge. After his discharge he brought other chattels on the premises, and the creditor claimed these under his mortgage security. The debtor brought this action to restrain the creditor from selling the after-acquired chattels.

The assignment, in fact, only amounted to a contract to give the creditor the after-acquired chattels. The liability caused by that contract (which was allowed to prevail, contrary to the common law rule, under the principle that what ought to be done is treated as done) is one provable under bankruptcy. Discharge in that bankruptcy, therefore, ends the

liability on it. It was a liability in respect of property which the mortgagor had at the time he became bankrupt.

Without saying that this would apply to the case of a marriage settlement containing a covenant to settle after-acquired property, when you have a debt and a covenant to secure that debt in a particular manner, it would be a strange result if you could bar the debt and not the ancillary covenant. Without, therefore, saying that this applies to a definite contract for the settlement of a specific property non-existing at the time, I am of opinion that where there is a general liability in respect of a debt which is barred by the bankruptcy, and a liability in respect of a contract to secure that debt, the bankrupt then is not only discharged from the principal liability to pay the debt, but also from the ancillary liability to give security for it on his after-acquired chattels. Thus the present and future property is discharged, and the after-acquired chattels are not liable to seizure by the creditor.

COMMENTS.

See now 45 & 46 Vict. c. 43, ss. 5 and 6, preventing the affecting by bills of sale of after-acquired property, save as there mentioned. This applies to bills of sale made after 1st November, 1882.

The effect of the discharge in bankruptcy upon the covenant in a marriage settlement to settle after-acquired property may probably, in accordance with what the M. R. says, be held to be (a) That as to property which vests in the covenantor and becomes subject to the covenant at any time before the discharge, the liability is thereby ended, subject to proof against the estate. (b) But that as to any accruing subsequently there will be no discharge. The provisions in the new Bankruptcy Act seem to be similar in these respects to that of 1869, see 46 & 47 Vict. c. 52, s. 30.

The analogy of *Sutton v. Sutton* (L. R., 22 Ch. Div. 511) (*infra*) seems to apply. This decision was followed by Fry, J., in a case where the bond was given separately to secure a sum also secured by mortgage of even date. (*Fearnside v. Flint*, 52 L. J. R., Ch. 479; L. R., 22 Ch. Div. 579.)

It is apprehended that having regard to the provisions of the Married Women's Property Act, 1882, the form of a covenant to settle after-acquired property will be considerably varied. As the intending man and wife will be on an equal footing as to the capacity to hold and dispose of property, in cases where each has about the same amount of property, the covenant in question

should have regard to that fact. By sub-sect. 5 of sect. 1 the married woman who trades separately from her husband will, in respect of her separate property, be subject to the bankruptcy laws, but this risk is of course less than that attaching to the liability of the man to become bankrupt. Having gone so far in equalizing the position would it not be logical to equalize the liabilities, and to abolish the incidental rights of both surviving husband and wife in default of dispositions by either of them?

Emden v. Carte.

[51 L. J. R., Ch. 41; L. R., 17 Ch. Div. 768.]

The remuneration of an uncertificated architect passes to the trustee in his bankruptcy. The argument that the daily wages of an artizan did not pass, because he must live, does not apply. As to a medical man this was decided, as we decide here, in *Elliot v. Clayton*, 20 L. J. R., Q. B. 217; 16 Q. B. 581.

Cockburn v. Edwards.

[51 L. J. R., Ch. App. 46; L. R., 18 Ch. Div. 449.]

The M. R.: The defendant was the plaintiff's solicitor in a mortgage transaction, his client being the mortgagor, and the defendant himself being the mortgagee. The advance was one from solicitor to client, in fact. He inserted an unusual power of sale, not providing for the usual notice. Fry, J., found that the power was unusual. Whether I should have thought so I do not say. The mortgage was a *second* one, and I am not prepared to say that the qualification as to notice which is inserted in a first mortgage should be in a second. It is a common practice to insert more stringent provisions in the second mortgage, but in the absence of proof that it is a settled practice we cannot so assume.

Solicitors lending to their clients should ordinarily have the intervention of another solicitor. Here the defendant sold the house without notice, and without interest being in arrear

for three months (the ordinary form would have allowed that grace). A mortgagee who takes possession may receive more than enough rent to pay his interest, but the profit thereby made would be accounted for only as "profit," and not as against principal and interest. Until an account is taken there is no appropriation or set-off. That is more plain as to the user of a mortgaged or pledged *chattel*. A pledgee of a horse letting it for hire may deduct the price of the keep of the horse from the money received for hire.

The dictum in *Brocklehurst v. Jessop* (7 Sim. 438 (V.-C. Shadwell) 442), that receipt of rents is *prima facie* evidence of payment within the Statutes of Limitation is wrong, and opposed to *Chinnery v. Evans*, 11 H. L. C. 115.

If it were right, it would follow that the mortgagee who took possession still had the ordinary rights of a general creditor. But the mortgagee is the legal owner of the estate, the rents whereof are his rents, and he takes *quâ* legal owner (of course subject to redemption). It is only therefore a receipt by a legal proprietor of something belonging to him in that character.

In *Chinnery v. Evans* (*sup.*) the whole question was, "whose agent was the receiver who had been there appointed?" It was held that to take the case out of the statute the payment must be by the "party chargeable or *his agent*." The receiver there was the mortgagor's agent. If the dictum in *Brocklehurst v. Jessop* was right it would have been immaterial whose agent the receiver was, because even if he had been the mortgagee's agent his receipt would have sufficed to take the case out of the statute.

By agreement rents received by a mortgagee may be appropriated to interest. This was done here, and the final account shows that the interest was not three months in arrear.

As to damages I am not sure that I should have allowed any, but we allow 10%. The plaintiff is not entitled to the estimated costs of making a new investment, nor to the difference between party and party and solicitor and client costs of action. Had not the house been sold at an advanced

price we should not have heard of this action. The charge of sale at under-value fails, and the defendant must have the costs incident to that issue. No costs of appeal, which partly succeeds and partly fails.

COMMENT.

See also *Harlock v. Ashberry* (*post*).

Bowles v. Drake.

[51 L. J. R., Q. B. 66; L. R., 8 Q. B. Div. 325.]

An action brought in the High Court but remitted for trial to the County Court under 30 & 31 Vict. c. 142, s. 10, becomes thereby a County Court action to all intents and purposes.

Robertson v. Robertson.

[51 L. J. R., P. D. & A. 5; L. R., 6 P. Div. 119.]

The M. R. : Where a decree nisi is made on a husband's petition for divorce he must, nevertheless, pay the wife's costs properly incurred in defending herself from the charges. In my opinion it is very proper that the husband should pay the costs incurred by the wife in defending herself from the heinous charge of adultery. By our law, failing a settlement, all her property goes to the husband. The solicitor who acts for her is not to blame that the wife is wrong. (*Flower v. Flower*, 42 L. J. R., P. & M. 45; L. R., 3 P. & D. 132.) He should be paid.

COMMENT.

The main reason mentioned here is now ended by the provisions of the Married Women's Property Act, 1882. Should not the rule be now altered so as at any rate to make such costs payable out of the wife's separate property, if she has any?

In re Wainwright, Ex parte Greener.

[51 L. J. R., Ch. App. 67; L. R., 19 Ch. Div. 140.]

If there has been no scheme of settlement of the debtor's affairs under sect. 28 of the Bankruptcy Act, 1869, and no resolutions for the close of the liquidation or discharge of the debtor under sect. 125, the trustee can take possession of any new business which the debtor, under the supposition that he was free to do so, has got together.

In re The Silkstone and Dodsworth Coal, &c., Company (Limited), Whitworth's Case.

[51 L. J. R., Ch. App. 71; L. R., 19 Ch. Div. 118.]

A witness has no *locus standi* to appeal against an order to attend and be examined, nor is there any ground, except want of jurisdiction, to make the order to attend, on which the order can be contested. The examination is usually given to the liquidator, but the Court may commit it to creditors or contributories.

Patching v. Barnett.

[51 L. J. R., Ch. App. 74; 45 L. T. 292.]

The M. R. : Where the age is part of the description of the devisee, if the gift is to the devisee who should attain that age, and the period for vesting is beyond the life in being and twenty-one years, the gift fails. The testator did not intend the youngest grandson (who was to take after certain life interests) to take unless he attained twenty-five. He provided a maintenance for the grandson if he were under twenty-one at the testator's death, and he states what is to be done with the income between his age of twenty-one and twenty-five—viz., he orders an accumulation. If the grandson dies under twenty-five, the gift and these accumulations

are to fall into the residue. If the gift had been *valid* and he had attained twenty-five he would get these rents and profits. The gift fails as to all provisions after the grandson attains twenty-one, and therefore fails in substance. The provision for maintenance until twenty-one is alone good.

An annuity which is charged on two specific farms "to the end and intent that the annuitant may be fully paid and satisfied the annuity, and with powers of entry and distress," is a legal limitation of a rent charge, and does not charge the personal estate at all.

If real and personal estate are being administered together the increased costs occasioned by the administration of the real estate are borne by it. The proper course is for the judge to name some sufficient aliquot sum to represent the costs to be borne by the realty. (*In re Middleton-Thompson v. Harris*, 50 L. J. R., Ch. 525 (Fry, J.), is overruled both by this case and expressly so. See 51 L. J. R., Ch. App. 273.)



In re Spindler, Ex parte Rolph.

[51 L. J. R., Ch. App. 88; L. R., 19 Ch. Div. 98;
30 W. R. 52.]

Both the 41 & 42 Vict. c. 31, s. 8, and the sect. 8 of 45 & 46 Vict. c. 43, which repeals the first-named section, require the consideration for a bill of sale to be truly set forth.

The M. R.: In this case the consideration was partly a payment of money and partly an agreement to pay a rent which was not actually due. The bill of sale was given 23rd March, 1881. No rent was due until the 25th March, 1881. Then 25% became due for rent, but this rent was not actually paid until the 30th March, 1881. [The consideration was thus stated: "In consideration of the sum of 50% by the assignee paid to the assignor at or immediately before the execution hereof (the receipt whereof the assignor doth

hereby acknowledge). The real question is, Did the borrower ever receive the 25l.? No. The lender was not intending to trust the borrower with the sum, but to save the goods from distress by paying it. The consideration really should have been stated as so much paid and so much covenanted to be paid. Again, it is quite certain that the words "50l. paid at or immediately before the execution hereof" are false. The money was not paid until seven days afterwards. Nor was there any then appropriation of the 25l. to meet the rent. A request and a promise to pay do not amount to an appropriation, but only to a contract.

In *In re Haynes, Ex parte The National Mercantile Bank* (49 L. J. R., Bank. 62; L. R., 15 Ch. Div. 42), all the money stated in the bill of sale to have been paid was actually paid in notes and gold. The actual question was whether the money so paid was the real consideration, or whether the true transaction was not that the grantor should have less, and the balance of the nominal consideration be retained. The Court of Appeal decided that the consideration actually paid in form was the real consideration, and that the bargain that a part should be repaid to meet the liabilities on the bill was a collateral bargain (whether they were right or wrong in that conclusion is immaterial), and that the Act did not render it necessary to state in the bill the collateral bargain as to the disposition of the money advanced.

In re Rogers, Ex parte Challinor (L. R., 16 Ch. Div. 260), presents more difficulties. The question was one of fact. Part of the sum expressed to have been paid was not actually paid, but deducted to meet certain expenses due, and a debt presently payable. The judges thought that it was a mere form which had been omitted by not handing the money retained backwards and forwards. It was, moreover, only a small sum in proportion to the amount secured, and the money was retained in pursuance of a prior agreement. In the particular circumstances of the case I agree that the decision was correct. Neither of the cases supports the contention that a *bonâ fide* loan, of which the borrower has the substantial

benefit, is sufficiently stated in the deed if described as a cash payment.

COMMENTS.

See also *Hamilton v. Chaine*, 50 L. J. R., Q. B. 456; L. R., 7 Q. B. D. 1; and *Ex parte Charing Cross Advance and Deposit Bank, In re Parker*, 50 L. J. R., Ch. 157; L. R., 16 Ch. Div. 35. Cotton, L. J., in *Hamilton v. Chaine*, explained that the Act was intended "to put a stop to the fraudulent practices of money-lenders" in deducting interest and commission as parts of an advance.

See also *Ex parte Bolland, In re Roper* (L. R., 21 Ch. Div. 543; 52 L. J. R., Ch. App. 113), where the M. R. further considered the Act. The consideration there was stated to be "2,000*l.* to the mortgagor paid by the mortgagee immediately before the execution of these presents." The grantor owed the grantee 2,000*l.*, the balance of 2,500*l.* purchase-money for a leasehold brewery. He had paid 500*l.* in cash, and gave the bill of sale for the balance, and this was accepted by the grantee in payment. Held that the consideration was truly stated.

The M. R.: The grantee's acceptance of the bill of sale as payment amounted to payment. It would support a plea of payment. A *bonâ fide* transaction of this kind is treated as a payment. *Ex parte Challinor* did not decide that the money must be applied in payment of a debt due by the grantor to a third party.

Cotton, L. J.: L. J. James, in *Ex parte Challinor*, states the principle as to this: "Whether the whole of the mortgage money is actually paid by the lender into the hands of the borrower, or whether part of it is with his privity or by his direction employed in the payment of a debt due by him, it is equally, in a legal sense, paid to him."

See also *Ex parte Firth, In re Cowburn* (51 L. J. R., Ch. 473; L. R., 19 Ch. Div. 419), where the M. R. distinguishes between an advance on terms of the lender paying out of it a debt due by the borrower to a third person, a portion of that sum being handed back again to the lender, or handed over by him to other persons who are creditors of the borrower, and a sum of money being retained which is not truly a debt until after the transaction itself is completed—*i. e.*, a sum which consists of the expenses of the transaction itself.

Harlock v. Ashberry.

[51 L. J. R., Ch. App. 96; 30 W. R. 112.]

Under Ord. LVIII. r. 15, the poverty of an appellant is alone sufficient ground for requiring from him security for the costs of an appeal.

The M. R. : *Rourke v. the White Moss Colliery Co.* (L. R., 1 C. P. Div. 556), has never been followed by the Court of Appeal sitting at Lincoln's Inn.

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Harrison v. The Cornwall Minerals Railway Company.

[51 L. J. R., Ch. 98; L. R., 18 Ch. Div. 334.]

The M. R. : The vested rights of persons acquired before the passing of a special or general Act are not, in the absence of the very strongest and clearest words, to be considered as interfered with by such Act.

COMMENT.

See this case, and *Robinson v. Drakes* (L. R., 23 Ch. Div. 98), for the practice as to costs of cross-appeals.

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Otto v. Lindford.

[51 L. J. R., Ch. App. 102; L. R., 18 Ch. Div. 394.]

The M. R. : Where an action has been dismissed by the Court below, with costs, such Court has jurisdiction to entertain an application for a stay of proceedings to enforce the certificate for costs pending the appeal.

Wilson v. Church (48 L. J. R., Ch. 690; L. R., 11 Ch. Div. 576; Seton on Decrees, 4th ed., p. 1618), was quite different. The plaintiffs there were asking for an injunction to restrain the defendants from dealing with the trust funds pending an appeal. The Court below had already dismissed the action, and therefore could not grant an injunction asked as incident to it.

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Fowler v. Barstow.

[51 L. J. R., Ch. App. 103; 30 W. R. 114; 45 L. T. 603.]

Where under Ord. XI. a plaintiff has obtained leave to serve a writ on a defendant out of the jurisdiction, the defendant, on moving to discharge the order, may go into evidence to show that no cause of action has arisen against him within the jurisdiction.

On this point *the Great Australian Gold Mining Co. v. Martin*, 46 L. R., 8 Ch. 289; L. R., 5 Ch. Div. 1, is overruled.

**Redgrave v. Hurd.**

[51 L. J. R., Ch. App. 113; 45 L. T. 485.]

The M. R.: As regards the rescission of a contract the former difference between the common law and equity rules is now unimportant, as, by the Judicature Act, the latter prevail. According to equity, in order to set aside a contract it is not necessary to prove that the person who obtained it and sought to keep it, if he obtained it by material misrepresentation, knew at the time that the representation was false. It was put in two ways, either of which induced the interference of equity, to rescind. (1) A man is not to be allowed to get a benefit from a statement which he now admits to be false. (2) Even assuming that you want moral fraud in order to set aside a contract, you have it where a man, having obtained a beneficial contract by a statement which he now knows to be false, insists upon keeping that contract. That was and is the rule in equity. At common law it was not quite so wide. According to the later cases at common law the statement must have been made recklessly and without care, whether it was true or false. Lord Cairns, in *The Reese River Silver Mining Co., Smith's case* (36 L. J. R., Ch. 385, 618; L. R., 2 Ch. 604), states the rule in equity as I have stated it.

So, if a man is induced by a false representation to enter into a contract, it is not a sufficient answer to him to say, "If you had used due diligence you would have found out the untruth; you had the means afforded you of discovering its falsity." It is the settled equitable rule, both as to rescission and specific performance, that this is no answer, of course subject to the exception of the Statute of Limitations when made a statutory answer on the ground of delay. The delay counts under those statutes from the time at which, by due diligence, the fraud might have been discovered. The effect of false representation is not avoided by negligence. The most familiar modern instances of this are, perhaps, false prospectuses referring the public to the actual contracts, which, if everyone saw, would show the falsity. So as to a false statement as to the covenants in a lease, which the intending purchaser could have seen himself.

Attwood v. Small (6 Cl. & F. 344), was relied on below as conflicting with this proposition. The judge (Fry, J.), says the defendant "inquired into (the statements) to a certain extent, and if he did it carelessly and inefficiently that is his own fault." The lords were three to five in this case of *Attwood v. Small*. We can only look at the judgments of those who decided the case. These give independent reasons for their judgments. The Earl of Devon's ground was that the purchasers did not rely upon any statements made to them, but resolved to examine and judge for themselves. A good ground if borne out, but not agreeing with the reasons given by the other judges. The L. C. (Cottenham) says in effect (p. 393) that he found no fraud, but that all the material facts were known before the contract was made. Neither of these reasons is anything like the proposition of J. Fry, that partial inefficient inquiry avoids the effect of a false statement. Lord Brougham's grounds are (1) no fraud; (2) no reliance on statements, but on their own inquiries. No cursory remarks by a law lord should unsettle the principle.

Now the plaintiff's advertisement in the Law Times [he was a solicitor wishing to dispose of a practice and a suburban .

house] meant in every line this: "There is a moderate practice; I shall not take a premium for it, if you will take my house off my hands,"—*i. e.*, the purchase of the house is the consideration for giving the defendant the partnership in this moderate business. Now the plaintiff admits on oath that he had no business of any kind worth mentioning to sell, but that he only intended to sell his house as the principal transaction. Can credit be given to him?

A material representation calculated to induce another to enter into a contract is not to be got rid of by saying that the defendant does not prove that he entered into the contract in reliance upon it. The plaintiff's action, for specific performance of the agreement to buy the house, is dismissed. The defendant raised an issue of misrepresentation as to the value of the house, and the quality of water supplied to it, as to which he has failed. He must pay the costs of that issue, but have the general costs of the action and the costs of the appeal.

Palmer v. Locke.

[51 L. J. R., Ch. App. 124; L. R., 18 Ch. Div. 381.]

J. G. had, under an appointment made by his father, a reversionary interest in the residuary estate of his grandfather, which estate had been paid into Court in an administration suit. J. G. petitioned for liquidation in 1873, and in June of that year a trustee was appointed. Subsequently (17th July, 1873) J. G. mortgaged all his interest under the will to E. to secure 650*l.* On the 1st April, 1875, J. G. mortgaged (*inter alia*) the same interest, subject to prior charges, to P. to secure 9,500*l.* On the 22nd October, 1875, P. obtained a stop order on J. G.'s share of the fund paid into Court, and on the 8th November, 1875, E. obtained a stop order on the same share. On the 26th November, 1875, J. G. mortgaged his interest in the fund to H., and on the 7th December, 1875, H. obtained a stop order on the same share. H. had no notice of the liquidation. On the 20th

March, 1876, the trustee under the liquidation obtained a stop order on J. G.'s interest.

The plaintiffs in this action who had purchased the interest of the trustee, and also the interests of E. and P. in J. G.'s share (which was still reversionary), put up this share to auction in May, 1879, at which sale the defendant purchased it for 2,000*l*. This was an action to enforce specific performance of the contract. The vendors did not abstract H.'s mortgage. The purchaser objected. The vendor disclaimed all knowledge of H.'s deed, stating that the deed and stop order of P. were both prior to H.'s deed and order, and declined to satisfy or discharge the incumbrances.

The M. R. : The decisions in *In re Barr's Trusts* (27 L. J. R., Ch. 548; 4 K. & J. 219) and *In re Atkinson* (2 De G., M. & G. 140; 4 De G. & S. 548) come to this, that where there are no negative words in the Bankruptcy Acts as to equitable choses in action, the mere enactment that the property shall vest, whether on the execution of a conveyance or without any conveyance, does not give the trustee a complete title in this sense, that a person who takes an assignment or charge without notice of the bankruptcy, and gives notice to the trustees of the fund before the assignee or trustee in bankruptcy gives notice, obtains priority. Bankruptcy is not notice to all the world. Neither does bankruptcy so absolutely vest all the bankrupt's property, such as his equitable interest in a fund, in the trustee, so that the bankrupt could not divest it. If, suppressing the absolute assignment caused by bankruptcy, he assigns to some one else, who finds the trustee has not given notice, and thereupon gives notice, that second purchaser is preferred by reason of the negligence of the first, a kind of postponement which, as we know from the doctrine in *Dearle v. Hall* (3 Russ. 1), is not confined to equitable choses in action. The Court of Appeal (Lord Selborne, L. C., and L.JJ. Baggallay and Lush) did not think it necessary to decide the actual question, as the title was too doubtful to force on a purchaser. They held that, under the circumstances, E. and P. (who had notice of the insolvency)

only had a security on the surplus after the whole administration in bankruptcy. E. and P. must stand in the place of the bankrupt, and not higher, as against every one.

H. had no notice of the insolvency, and that, under the cases cited by the M. R., gave him priority over the trustee.

As to *In re Bright's Settlement* (L. R., 13 Ch. Div. 413) the M. R. thought that perhaps that might have been differently decided on the arguments addressed to him. It was a decision on the Bankruptcy Act of 1841 (sect. 41). Lord Selborne observes that, if it was a good decision, it seems to have depended on the special negative words in the statute there in question. These do not occur in the Act of 1869.

The Yorkshire Fire and Life Insurance Company v. Clayton.

[51 L. J. R., Q. B. App. 82; 30 W. R. 174.]

The M. R.: The 41 Vict. c. 15, s. 13 (Inhabited House Duty Amendment Act), which was passed in consequence of the decision in *The Att.-Gen. v. The Mutual Tontine Westminster Chambers Association* (45 L. J. R., Exch. 886; L. R., 1 Exch. Div. 469), does not exempt sets of rooms in one entire building having an outer door common to all, and occupied partly as business offices and partly as residential chambers. The word "tenements" in the Act can and must be read as equivalent to that which is a house at law. "Flats" are, for legal purposes and by modern usage, separate houses.

Erichsen v. Last.

[51 L. J. R., Q. B. &c. App. 86; L. R., 1 Q. B. Div. 414.]

The M. R.: This question arises on the Income Tax Act (16 & 17 Vict. c. 34, s. 2, sched. D.). The Divisional Court decided—(1) That the appellant company carries on trade in this country within the Act; (2) That the profits of such trade

are liable to income-tax whenever the expenses are incurred: i.e. that the company cannot deduct from the profits any imaginary or estimated profit which would accrue if the company carried the telegraphic messages along its own cables abroad. The company in trade is a compound fact.

This company has stations here, and the ends of their cables are here, and worked by a staff here. There is an office in London, and the company there takes and transmits messages. That is plainly trading here. A contract made here to transmit messages is a trading. If a railway company with a station at Dover and another at Calais carries passengers from Dover to Calais regularly that is a trading at Dover.

"Profit" is the difference between the price received and the cost price. From the amount received deduct costs of transmission, and the difference is the taxable profit. It is said that the foreign cables earn the profit. They do not; the use of them may diminish the expense of earning a profit, and thus diminish the cost price, and that is all. [And see *The Mercury Docking and Harbours Board v. Lucas*, 51 L. J. R., Q. B. 114, 1670.]

Hornby v. Cardwell (Hambury third party).

[51 L. J. R., Q. B. &c. 89; L. R., 8 Q. B. Div. 329.]

An underlessee, whose underlease is "subject in all respects to the terms of the existing lease and the covenants and stipulations contained therein," is properly made a third party under the Judicature Act, 1873 s. 24, sub-s. 3, and Ord. XVI. r. 8j, and the whole costs, including those of an action by the original lessor against the lessee [underlessor], are in the discretion of the Court. LJJ. Brett and Cotton held that the original lessee could also recover any such costs against the underlessee as damages, the contract between them including one of indemnity against such costs.

COMMENT.

The procedure against the "third party" seems to be much amplified by the new rules. It has been pointed out that there is

an omission of power to try a claim made by the third party against the defendant. This should be rectified.

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In re Johnson, Ex parte Edwards.

[51 L. J. R., Q. B. 108 ; L. R., 8 Q. B. Div. 262.]

A London agent for a country solicitor cannot retain documents in respect of a lien for a claim on such country solicitor. The Court will exercise summary jurisdiction over any London agent so attempting, and order him to hand over the documents.

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The Mersey Docks and Harbour Board v. Lucas.

[51 L. J. R., Q. B. 114 ; 46 J. P. 388.]

“Local enactments directing that the revenue shall be applied to certain purposes, and no others, are directory only, and mean that after all charges imposed by law on the revenue have been discharged, the surplus or free revenue which otherwise might have been disposed of at the pleasure of the recipients shall be applied to these purposes.” (Blackburn, J., in *The Mersey Docks and Harbour Board v. Cameron*, 35 L. J. R., M. C. 15.)

The M. R. : That applies to all local Acts, for the good reason that persons who obtain them are not checked by the public nor by public representatives ; they are dealing with their own property, and not with the public right, to obtain taxes from that property, or in respect of it.

Then the income-tax is granted to the Crown, which is not bound by any local Act, subject to certain exceptions which do not apply to this Act. The prerogative of the Crown has nothing to do with the mode of applying the tax. On this ground it was held in *Ex parte The Postmaster-General, Re Bonham* (48 L. J. R., Bank. 84 ; L. R., 10 Ch. Div. 593), that the privileges of the Crown in this respect extend to the Postmaster-General. There is as much reason for applying

the doctrine when the revenue is applicable to public purposes as to the private purposes of the Sovereign, who formerly had personal control over revenues the control whereof is now parliamentary.

Then the Income Tax Act in question is subsequent in date to the local Act, which is thereby impliedly repealed to the necessary extent.

What are "profits"? The "profits of a farm" mean the "*net produce of the land*." That is the meaning in Rules 2 and 3, Sched. A. Then (*inter alia*) Rule 3 applies to *docks*. Tolls or dock rates are got on a dock or a navigation, and the profits are the net proceeds after deducting the expenses of carrying on the docks. The tax is payable by the person or corporation (this board is a corporation) carrying on the concern.

Peat v. Jones & Co.

[51 L. J. R., Q. B., &c. 128; L. R., 8 Q. B. Div. 147.]

If a trustee under a liquidation sues for a debt due under a contract made with the debtor, the defendant may set off a claim for unliquidated damages arising out of an alleged breach of such contract by the debtor.

The China Transpacific Steamship Company v. The Commercial Union Assurance Company.

[51 L. J. R., Q. B. 132; L. R., 8 Q. B. Div. 142.]

In an action to recover particular average on a marine policy of insurance the defendant company can without affidavit, and under the old practice, stay the proceedings until the ship's papers and other documents have been produced by the plaintiff and others interested in the proceedings and insurance.

The Att.-Gen. v. Noyes and Others.

[51 L. J. R., Q. B. 135; L. R., 8 Q. B. Div. 125.]

Conveyance by B. by two separate deeds of certain government annuities and a sum of 16,000*l.* consols to trustees on trust to pay the annuities and current income arising from consols to B. for four years from date of deeds, if he should so long live, and then, from and after such period, or B.'s death, whichever should first happen, on trust to pay the same, as directed, to certain of B.'s nieces. B. died before the expiration of the four years.

Held that succession duty was payable on the entire annuities and the whole 16,000*l.* consols, and at 3 per cent.

The M. R.: This is a "succession" within 16 & 17 Vict. c. 51, s. 2. The death of B. was the event by which his nieces became entitled, and B. was the predecessor. Sect. 32 applies certain provisions of the Legacy Duty Act (36 Geo. 3, c. 52), and sect. 10 gives amounts of duties to be paid in different successions. Sect. 5 is the only other section aiding the construction of sect. 2. Its effect is that cesser of charges, &c., is chargeable with duty as against persons in possession of property. It was said that B.'s death only caused a gain of the amount of income which accrued in the four years, but the Act applies not merely to the increase of benefit which would accrue to the successor, but also to the property which is acquired on the happening of the event.

In the case of an estate limited to a person during widowhood, if the widow married again the successor would not have to pay duty; but if she died before she married again, then the duty would be payable. An estate may be limited in twenty various ways, one of which might be death. If that happened succession duty would accrue, although on the nineteen other events it might not. A very old man might, no doubt by free gift, avoid the Act [but the gift must be absolute, and not a mere device to evade the statute].

Ex parte Sadler, In re Hawes.

[51 L. J. R., Ch. App. 201 ; L. R., 19 Ch. Div. 122.]

If a lessor is dissatisfied with an order in bankruptcy giving a trustee leave to disclaim a lease, he should apply to the Court to stay proceedings under it pending an appeal. If he does not, and the trustee has executed the disclaimer, the lessor cannot appeal.

In re The Cape Breton Company.

[51 L. J. R., Ch. App. 202 ; L. R., 19 Ch. Div. 77.]

A bankrupt contributory to a company has no *locus standi* to make any application in the winding-up (sect. 77 of the Companies Act, 1862), passing all his rights to his trustee.

Burrowes v. Forrest.[L. R., 19 Ch. Div. 56 ; 51 L. J. R., Ch. 206, cited to and followed by Chitty, J., in *Jones v. Wedgwood*, 51 L. J. R., Ch. 206 ; L. R., 19 Ch. Div. 56.]

If an action in the Chancery Division is referred to an arbitrator the award need not be made a rule of Court before enforcing it.

Webber v. The London, Brighton and South Coast Railway Company.

[51 L. J. R., Q. B. App. 154.]

The Appeal Court will not stay execution to enable a party dissatisfied with the amount of damages to consider as to an appeal to the House of Lords.

The application is only granted where an appeal has been presented, or, if the House of Lords be not sitting, there is an undertaking to present it.

Rosenberg v. Cook.

[51 L. J. R., Q. B. App. 170 ; L. R., 8 Q. B. Div. 162.]

The M. R. : In this case the vendor, believing that he had a title to this piece of ground which he had purchased from the railway company, and which had a tunnel under a considerable part of it, put it up for sale subject to certain conditions. One of these precluded any objection being made to the title unless taken within seven days from delivery of the abstract, and as to that, it was stated in the condition that time was to be of the essence of the contract. The purchaser knew the contents of the conveyance under which the vendor claimed to hold. It turned out that the conveyance was *ultra vires* and void. The conveyance, therefore, passed no property at law, and the vendor only had a bare possession. The purchaser's solicitors were bound to take the objection within the time. The title of a disseisor in this country is a freehold title, and although a very bad one and liable to be defeated by the company, yet it was good as against the rest of the world. A title could be acquired under the Statute of Limitations even as against the company. The vendor sold fairly, not knowing the infirmity of his title, and is not to be deprived of the benefit of the special condition requiring objections within a specified time. This action, to recover the deposit paid, fails.

Nuth v. Tamplin.

[51 L. J. R., Q. B. 177 ; L. R., 8 Q. B. Div. 247.]

By virtue of sect. 23 of 41 & 42 Vict. c. 26, the notice of claim and declaration of every lodger claimant to a borough parliamentary vote; whether claiming under the former statute (30 & 31 Vict. c. 102, s. 4) or this statute, constitute *prima facie* evidence of qualification, and the lodger need not attend on the first occasion unless he wishes to meet any objection which may have been made.

**Bradley v. Baylis, Morfee v. Norris, and Kirby
v. Biffen.**

[51 L. J. R., Q. B. App. 183; L. R., 8 Q. B. Div. 195.]

The questions involved were the several cases in which the claimants were "inhabitant occupiers" and "lodgers" respectively within the 30 & 31 Vict. c. 102, ss. 3 & 4, and 41 & 42 Vict. c. 26, s. 5.

The M. R.: As to a lodger in unfurnished lodgings, where the owner does not let the whole house, but retains a part for his own use, and resides there, and does not let out the passages and staircases to the outer door, but only lets to the tenants the right of ingress and egress, the owner retaining control over the staircases and passages to enter doors; *i. e.*, where he retains the right to interfere and turn out trespassers, &c., there the landlord is the occupying tenant and the inmate is a lodger.

If the landlord lets the whole house in separate apartments, and lets out each floor separately so as to demise the passages, reserving simply to each inmate of the upper floors a right of ingress and egress over the lower passages, parting altogether with the whole legal ownership, and retaining no control over the house, there the inmates are the occupying tenants, and rateable as such. If the inmates have latch keys to the outer door and a latch key to the inner door, or if the landlord does not reside himself but has resident servants who occupy on his behalf part of the house, the inmates are still lodgers. Nor does it make any difference in these cases whether the landlord repairs or pays rates and taxes. On the other hand, where the whole house is demised, except the staircases and passages, the mere fact that these are not demised does not distinguish the inmates from occupying tenants.

[The M. R. pointed out that of course a "house" was differently defined by the effect of the Taxing Acts, so that decisions under them did not apply.]

***In re* The Sutton Coldfield Grammar School.**

[51 L. J. R., P. C. C. 8; L. R., 7 App. Cas. 91.]

The M. R.: The Endowed Schools Acts, 1869 & 1873, enable the Charity Commissioners to make schemes "from time to time" and with due regard to the future. Sect. 11 of the 1869 Act preserves "the privileges or educational advantages to which a particular class of persons are entitled." Held that the word "entitled" is meant to protect vested legal interests. A person is not "entitled" to that which he has enjoyed by permission or bounty.

***In re* The Haven Gold Mining Company.**

[51 L. J. R., Ch. App. 242; L. R., 20 Ch. Div. 151.]

The M. R.: The mere fact of there being in the prospectus statements which are afterwards proved to be fraudulent is not sufficient to induce the Court to make a winding-up order. A company may, if they think fit, waive the fraud and go on. But where the whole property which is the whole substratum and *raison d'être* of the company is gone, the majority cannot bind the minority to enter into a new speculation. The objects for which the company was formed having failed, the petitioners, although a very small minority of the shareholders, and although the company may be solvent, have a right to say, "Stop, divide what you have between those entitled, and do not involve me in a further speculation to which I never consented to be a party [the extension of the leases supposed to have been acquired by the company], and which never could be beneficial to anyone."

***Truscott v.* The Diamond Rock Boring Company.**

[51 L. J. R., Ch. App. 259; L. R., 20 Ch. Div. 251.]

The M. R.: The simple question is whether a lease can be well granted under the power contained in the settlement of

1863, which provides that the lease must be to a tenant "who shall covenant or agree to improve or repair." An agreement (as here) to do "necessary repairs" meets that. It is an agreement to repair simply, for if repairs are wanted at all they are necessary, and if they are not wanted they are not necessary.

It is not necessary to say whether all the dicta in *Doe v. Withers* (1 L. J. R., K. B. 38; 2 B. & Ad. 896), are good law; it is sufficient to say that the case is not binding on this Court.

In re Wood, Ex parte Horrocks.

[51 L. J. R., Ch. App. 261; L. R., 19 Ch. Div. 367.]

In a liquidation by partners a resolution for transfer of the proceedings from one county court to another, under r. 288, is not valid unless a similar resolution is passed at the meetings of the separate creditors of each debtor.

Biggs v. Bree.

[51 L. J. R., Ch. App. 263; 30 W. R., 278; 46 L. T. 8.]

In an administration action real estate was sold under an order of the Court. The purchaser's deposit was paid by cheque drawn payable to the auctioneer or order. Before certificate of result of sale, B., a member of the firm of solicitors who had the conduct of the sale, wrote in the name of the firm for and obtained from the auctioneer the cheque, which the auctioneer indorsed to him, that the money might be paid into Court. B., unknown to his partners, cashed the cheque and absconded. Held that it was fairly within the scope of the solicitor's authority to apply for the cheque, in order to pay it into Court, even before certificate, and therefore that B.'s partners must make good his defalcations.

Sanders v. Sanders.

[51 L. J. R., Ch. App. 276; L. R., 19 Ch. Div. 373.]

The M. R.: The V.-C. appears to have decided that where one tenant in common has by twenty years' adverse possession under the Statute of Limitations acquired an absolute indefeasible title, he could, by a subsequent payment of rent or acknowledgment, after the expiration of the twenty years, revest in his co-tenant that old title. I dissent from that proposition of law. We have held the contrary in *In re Alison*, L. R., 11 Ch. Div. 284. That does not affect the question as to admitting even a subsequent acknowledgment as evidence of payment within the twenty years. When you look at *Stansfield v. Hobson* (22 L. J. R., Ch. 457; 16 Beav. 236; 3 De G., M. & G. 620), the point was not noticed in the judgments though mentioned in argument. But in this case the unexplained payment or accounting to the co-tenant for fifteen-and-a-half years before action brought for a moiety of the rents, is good evidence from which a jury would infer previous payment. The Statute of Limitations is therefore out of the case.

**Errington v. The Metropolitan District Railway Company.**

[51 L. J. R., Ch. App. 305; L. R., 19 Ch. Div. 559.]

The M. R.: Under the powers of the Lands Clauses Act, 1845, and the Railways Clauses Act, 1845, a company which has the usual powers to take lands in the special Act can compulsorily take minerals without the land. And although the company may not have originally purchased more than the surface without the minerals, they may, within the statutory limit as to time, afterwards purchase the minerals. As to whether the land or the minerals are "necessary for the purposes of the undertaking," the *bonâ fide* opinion of the engineer of the company guides the Court.

(1) "Land" (by the interpretation clause) includes "hereditaments," which, of course, includes *minerals*. (2) The power to purchase can only be taken away by the expiration of the statutory period. (3) The company, acting *bonâ fide*, are to judge what they require. See Lord Cranworth's observations in *The Stockton and Darlington Rail. Co.'s Case*, 9 H. L. C. 246.

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*In re Baker, Collins v. Rhodes. In re Seaman,
Rhodes v. Wish.*

[51 L. J. R., Ch. App. 315; L. R., 20 Ch. Div. 230.]

Mere delay by a specialty creditor in not suing on his specialty for eighteen years does not, either at law or in equity, deprive him of his right to sue. A covenant clear in terms cannot be controlled by any recital.

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Marshall v. Berridge.

[51 L. J. R., Ch. App. 329; L. R., 19 Ch. Div. 233.]

The M. R.: This question is whether there was an agreement [for a lease] at all between the parties. The Court below [Fry, J.] held that because the agreement itself had a date that was taken to be the date from which the lease was to run [the agreement being silent as to this]. There is no authority for such a proposition, but much against it. *Blore v. Sutton* (3 Mer. 237) is exactly in point. Fry, J., attempted to distinguish this in *Jaques v. Millar* (47 L. J. R., Ch. 544; L. R., 6 Ch. Div. 153), on the ground that it did not appear from the report in *Merivale* that the agreement there had a date. I concluded otherwise from the report, and I have sent for the record, which shows that there was a date in the mem. there.

I cannot agree with *Jaques v. Millar* (*supra*).

No doubt if, on a given day, A. agrees to let, and B. to take, a house, and that operates as a lease or present demise

at law, then the words, being in the present tense, relate to the date of the instrument, and the term commences from that date. That is the meaning of *Doe v. Benjamin* (8 L. J. R., Q. B. 117; 9 Ad. & E. 644; 1 P. & D. 440) and that class of cases. It is equivalent to saying, "*On this day I demise,*" and there is no such difficulty as there is in an executory agreement to grant a lease. In such an agreement not only is it not to be supposed that it is to operate from its date, but the very opposite is to be presumed. There is always something more to be done. There is a lease to be prepared. Here there are the very words pointing to the formal lease which "is to be prepared and executed." Such preparation is a condition precedent.

I rest my decision on the ground that the mere fact of there being a date to the agreement does not show that from it the lease is to operate. The plaintiff has also asked the Court to apply a different construction from that which the facts show he alleged below.

COMMENT.

In *The Rock Portland Cement Co. v. Wilson* (52 L. J. R., Ch. 214) Kay, J., thought that the words in the agreement for a lease, "immediate possession if required," did not distinguish the case from *Marshall v. Berridge* (*supra*).

In re Robson, Emly v. Davidson.

[51 L. J. R., Ch. App. 337; L. R., 49 Ch. Div. 156.]

The M. R.: A man entitled to personalty above 20,000*l.* in value, half consisting of pure personalty, and the other half of some debts due from a mercantile firm, secured by equitable mortgage on chattels real, or what we call property savouring of the realty or impure personalty, was minded to make a voluntary settlement. He intended to settle the bulk upon his wife for life, then to himself for life, and then as his wife should by will appoint. But when the settlement was executed (8th August, 1868) both husband and wife contemplated that the wife would survive, and that she would make a will giving the property to charities. Accordingly,

when the settlement was made, the husband covenanted to pay 20,000*l.* to trustees within twelve months, upon such trusts as, after the death of the survivor, the wife should by will appoint. By her will made same day the wife appointed the 20,000*l.* to trustees, who, after paying certain legacies, were to pay the residue to such purposes as the wife should by deed poll direct. By deed poll executed the same day the wife directed the trustees to pay the fund to certain other trustees for charitable purposes. The deed remained in the covenantor's possession; but if he had paid the money according to his liability under the covenant it would have been invested in consols, and this question would not have arisen. It was an ordinary debt, and would have been provable in bankruptcy. It is a mere accident that by our law a debt can be enforced out of realty, and there was no intention to avoid the Statute of Mortmain, of which the man probably never heard. [He died in 1877 without having paid the money, his wife having died before him. This was an action to administer his estate, which scarcely amounted to 20,000*l.* in all, and the greater part of which was invested in an equitable mortgage of leaseholds.]

The mischief avoided by the statute is not affected by this case. The creditors cannot get real estate in any shape; they are only entitled to have the mortgage called in, and to have the mortgaged property turned into money to pay their debts. Nothing is devoted to land, or an interest in land, or kept out of the power of alienation, which it was one of the real objects of the statute to keep unfettered.

In the great case of *Jeffries v. Alexander* (31 L. J. R., Ch. 9; 8 H. L. Cas. 594), two circumstances, which do not occur here, were the grounds of the decision. They were—(1) That the testator's assets consisted entirely of real assets, and that he knew that the charities could not be provided for except out of real assets; that he had consulted a counsel who had made the law of assets his special study with the view of devising a scheme to apply his real assets to charitable purposes, and that such counsel had devised such a scheme. It was a device,

in fact. (2) That the form of the instrument was such that no action could be brought upon it in the testator's lifetime, and it only provided for payment if he thought fit, because it was a covenant to pay out of the remainder or residue of his personal estate after paying debts and legacies; and he might have incurred any amount of debts afterwards, or given any number of legacies, in which case there would have been nothing wherewith to pay the sum covenanted to be paid. It was, in fact, a settlement of the residue, or bulk of the residue, of his personal estate which he should die possessed of; and, of course, so far as it was impure personalty, it was in that way a disposition of impure personalty after his death by way of gift.

Now here the right of action occurs in the covenantor's lifetime. The fact that a creditor requires the real assets to be sold or turned into money, because it is the only substantial remedy which he has, is not within the purview of the statute at all. Then the terms of the deed itself do not bring it within such purview. The charity is to provide poor women with lodgings. There is a trust to hire rooms, to which the dictum of Lord Eldon applies. The trustees who hire rooms do not put anything into them. The hiring is only to be temporary, and different rooms are hired. The charity can be established without building anything to be permanently devoted to charity. The document called a deed would (having been attested by two witnesses) be admitted to probate as a testamentary instrument.

COMMENT.

If the action had been brought, say at the expiration of the twelve months, and therefore against the covenantor in his lifetime, the plaintiffs might have had the ordinary judgment creditor's remedies against the land, and it is to be noted that the remedy by *elegit* or equitable execution amounts to more than a conversion of realty into money, viz., to a taking of the land itself. But it seems to follow from *Alexander v. Brame* (7 De G., M. & G. 525), the judgments in *Jeffries v. Alexander* (*supra*), and L. J. Lindley's judgment in the above case, that this option to creditors does not bring the case within the Statute of Mortmain.

In re The Padstow Total Loss and Collision Assurance Association, Ex parte Bryant.

[51 L. J. R., Ch. App. 344 ; L. R., 20 Ch. Div. 137.]

The M. R. : An illegal company cannot be wound up under the 199th sect. of the Companies Act. Sect. 4 prevents this, inasmuch as it prevents the formation of an illegal company. Is this mutual marine association illegal within sect. 4, not having been registered ? The only evidence which we have of the objects of the company is in the form of its policies. They are in the ordinary form of Lloyd's policies. Each policy is one effected on a ship by certain persons described as assurers, and who sign by procuration through a person so signing "for the several members of the Padstow, &c., Assurance Association." Every member bears his equal proportion of the loss, according to the sums mutually assured therein ; therefore that follows the ordinary form of marine assurance by the assurers who are members of the association. Two things are provided for (1) Marine cases, the total or partial loss of a ship, or the liability incurred by running down some other ship, and (2) The mutual guarantee of each other's solvency as regards the making up of the amount of the loss. The amount of the loss is the only limit to the claim. The company was intended to last many years, was governed by a committee, and has every feature of a marine mutual assurance company. The primary object of the company was "mutual insurance;" but it also has for an object the acquisition of gain by its members. They pay a small sum with a view of receiving a large one in an uncertain event, which, if it happens, would otherwise cause them a large[r] loss. Is it the less an acquisition of gain because the event which makes it payable happens to be a loss ? The Act intended that such associations should be registered.

I dissent from the dictum of L. J. James in *The South Wales Atlantic Steamship Co.* (46 L. J. R., Ch. 177 ; L. R., 2 Ch. Div. 763) that an illegal association can be wound up. L. J. James there seems to have thought that even if the

company could be wound up, it could only be wound up without contribution between the members; but if the order could be made, the right of contribution would follow under sect. 38.

L. J. Brett pointed out that an association might be illegal although registered; he did not feel justified in saying that it might not then be wound up although illegal. I think the question is whether the company ever legally existed. If it is within sect. 4, then that says in effect that it never was formed, and therefore never did exist. I withdraw my expressions of opinion as to marine insurance companies [at p. 54 of the L. J. R., and p. 280 of the L. R.] in *Smith v. Anderson* (*supra*), which I now feel cannot be maintained.

Lindley, L. J., agreed that the diminution of loss was a gain within sect. 4.

COMMENTS.

The question which Brett and Lindley, L.JJ., apparently leave open is whether a company registered, but illegal, can be wound up. The M. R. puts the matter thus:—If the 4th sect. prohibits the formation, it is not to be supposed that the 199th sect. gives powers to make an order to wind up, which includes the statutory consequences of liability to contribution under sect. 38, &c. Lindley, L. J., puts the case of a contract with fifteen or sixteen persons, who were in fact (but unknown to the creditor) associated with thirty or forty more, and says that those fifteen or sixteen might be sued, and judgment obtained against them, and an order to wind up that association of fifteen or sixteen persons which the creditor knew, obtained. If they were to set up that they were associated with thirty or forty more, and were, therefore, an illegal association, he doubted whether that would avail them either in the action or on the winding-up. But if the creditor sued all the members of the illegal association, or petitioned to wind it up, he would be in the difficulty of having to invoke an illegal contract to aid him in making out his case against those persons of whom he never before heard.

It is presumed that this refers to an association of the fifteen or sixteen not coming within sect. 4. If it is within sect. 4 it must be registered; if registered, must not the company, *as registered*, be sued or petitioned against, and could the fifteen or sixteen be then dissociated from the thirty or forty?

See also *Shaw v. Benson* (52 L. J. R., Ch. App. 575) and

Jennings v. Hammond 51 L. J. R. Q. B. 493; L. R., 9 Q. B. Div. 225.

Shardlow v. Cotterill.

[51 L. J. R., Ch. App. 353; L. R., 20 Ch. Div. 90.]

The M. R. : The plaintiff bought by auction a house at the Sun Inn, Pinxton, on the 29th March, 1880, for 420*l.*, paid his deposit, and obtained a receipt in the following terms :—
 “Received of S. the sum of 21*l.* as deposit on property purchased at 420*l.* at Sun Inn, Pinxton, on the above date (29th March, 1880)—W. G. Cotterill, owner.” It is not contested that if the auctioneer had said “house purchased” that would do, but it is said that because the word “property” is used, that will not do. At the same sale conditions of sale were produced, headed “Property sale at the Sun Inn, March 29th, 1880,—W. G. Cotterill, owner,” and at the bottom occur the words, “the property duly sold to Shardlow, and deposit paid at close of sale,” which memorandum the auctioneer signed. J. Kay rightly held that, having regard to the word “purchased” in the receipt, and the production of the conditions of sale, the two documents were sufficiently connected to be read together, but he thought that, taken together, they afforded no adequate description of the property to satisfy the Statute of Frauds. I do not agree. I think that the receipt alone contained a sufficient description. Refer to the statute itself. Decisions are apt to drift away from the statute. Sects. 4 and 5 are alike as to the sufficiency of description of parcels bought or devised by will. I consider that any two specific terms applying to the subject matter afford a sufficient description. If you have “the estate of A., in the county of C.,” that is specific on its face; or, “the estate of A. which he bought of B.,” or, “the estate of A. devised by B.” These will suffice. In the case of a will no one would doubt the sufficiency of the description (sect. 5). Why, then, will he upon a contract (sect. 4)? In both cases parol evidence is necessary to show what the

property is. If that suffices, why not "the property of A. which he bought of B. on such a day?" That would suffice in a will. Why not in a contract?

There are three things here—(1) a given day, (2) at a given place, (3) belonging to G. Cotterill (a given person). The description is ample to enable anyone to find out the property. Admittedly, the word "farm" or "house" would have done; but there might have been the same dispute as to either of these as here. The conditions clearly refer to real property. There is nothing requiring an inseparable incident to be added to the description. A separate incident is quite as good. Thus "all that farm, in the tenancy of A., devised to B., and now conveyed to C.," would be quite sufficient, although there is no connection between the reference to the tenancy and the devise. The property may have passed as residue, yet it is a very good description. It requires parol evidence to identify the property.

There is no rule that because you have a general form in one document you may not make it certain by reference to another. Thus the old words in the deeds to make tenants to the præcipe were, "All the lands, &c., of which A. B. is tenant for life." They caught everything, but outside evidence was necessary to make out what the properties were.

In re Talbot.

[51 L. J. R., Ch. App. 360; L. R., 20 Ch. Div. 269.]

Although the Court of Lunacy here has a discretionary power under the Lunacy Regulation Act, 1853 (sect. 52), to act upon proceedings in lunacy taken in Ireland, and of which a transcript has been transmitted and entered of record in this country, the Court will not exercise the jurisdiction to rectify an alleged miscarriage of justice in Ireland. And if the lunatic is no longer of unsound mind, application for a supersedeas ought to be made in the country in which the proceedings were originally taken.

Upon an application for a supersedeas, semble, that the Court has no power to direct the question of the lunatic's soundness of mind to be determined by a jury.

In re Latham, Ex parte Gregg.

[51 L. J. R., Ch. App. 367 ; L. R., 19 Ch. Div. 7.]

The M. R. : The lease contained this proviso : "That the lessee, his executors, administrators, and assigns, may at any time or times during the continuance of the said term, or within twelve calendar months from the expiration or sooner determination thereof, but not afterwards, remove any buildings or machinery which he or they may have erected on the said premises for trade purposes." That is a licence to remove trade fixtures within a certain time after determination of the lease. The lessee filed a petition in liquidation, and his trustee in the liquidation, acting under that licence, removed the fixtures and then disclaimed the lease. The landlord says : "You have done a wrongful act ; the effect of your disclaimer is to determine the lease and every provision therein." Sect. 23 of the Bankruptcy Act, 1869, says, a disclaimer is to operate from the adjudication. Here it would be from the date of the appointment of the trustee. The lease was, therefore, here surrendered the day before the trustee removed the fixtures. That being so, what he has done cannot be justified.

COMMENT.

See also in *In re Fussell, Ex parte Allen*, 51 L. J. R., Ch. App. 724 ; L. R., 20 Ch. Div. 341 (*post*) ; and *The East and West India Dock Co. v. Hill*, 52 L. J. R., Ch. App. 45 ; L. R., 22 Ch. Div. 14. See also now the Bankruptcy Act, 1883, sect. 55.

Schjott v. Schjott.

[51 L. J. R., Ch. App. 368 ; L. R., 19 Ch. Div. 94.]

The next friend of a suing married woman must, on being challenged, produce his authority to commence the action, or such action will be dismissed with costs.

Goodier v. Johnson.

[51 L. J. R., Ch. App. 369 ; L. R., 18 Ch. Div. 441.]

A testator by will dated 22nd November, 1837, devised real estate to trustees upon trust to pay, out of the rents, annuities to his daughter M. and son W. and their respective issue, and directed the trustees after the death of the longest liver of them, his son W., and his widow (if any), and his daughter M., to stand possessed of the same upon trust to sell and to stand possessed of the proceeds of sale upon trust to divide them "equally amongst all and every the child and children of my son W. and my daughter M. share and share alike, and the issue of such of them as may be then dead leaving issue, such issue to be entitled to no more than their parent, or respective parents, would have been if living." The testator directed that if his daughter's son (then living) should die without leaving issue, or leaving issue, all of them should die under age and unmarried, the trustees should pay the share which would have been payable to him under the above trusts to the children of J.; and that if W. died without leaving issue, or leaving issue, all of them should die under age and unmarried, the trustees should pay the share which would have been payable to them under the trusts aforesaid to the children of J. and M. W. survived M., and died leaving a widow and several children, of whom some survive still. The testator's heir-at-law claimed the trust estate on the ground that the disposition of the proceeds of sale was void for remoteness, as being a gift to a class not ascertainable until the death of the son's widow—the period

of distribution—who might be a person unborn at the testator's death.

The M. R. : The question really is, What is the class to take ? The gift to all the children of W. and M., and the issue of such of them as may be dead at the period of distribution, cannot be read as a gift to such of the children as are then living, and the issue of such of them as may then be dead. The son of M. would, but for the gift over, take a share independently of the question whether he survived the period of distribution or not. So also as regards the son W. If the issue attain twenty-one, or marry, they are to take under the preceding gift whether they do or do not survive the period of distribution, because the gift over is of the "share which would have been payable to the child or children of W. under the trusts aforesaid." It would be absurd to suppose that if a child die leaving issue, his representatives can take a share under the first part and his issue take another share under the second part of the sentence. Therefore such second part contains a substitutional gift. The meaning clearly is that the issue are to have the share which the parent, if he or she had survived the period of distribution, would have taken. Therefore there is a gift to a class who must be ascertainable within the prescribed limits, subject to gifts over of the shares in certain events. If any of the gifts over are invalid, the original gift remains unaffected.

Emden v. D'Oyley Carte.

[51 L. J. R., Ch. App. 371 ; L. R., 19 Ch. Div. 311.]

If an undischarged bankrupt brings an action for services rendered since his bankruptcy, in which the trustee afterwards intervenes as co-plaintiff, the bankrupt's solicitor will be entitled to a charge on the amount recovered, under sect. 28 of the Solicitors Act, 1860.

Blake v. Blake.

[51 L. J. R., P. D. & A. App. 36; 51 L. J. R., Ch. 377; L. R., 7 P. Div. 102.]

The M. R. : The testatrix did not sign her name in the presence of the two witnesses, but before they came in. Then what is a sufficient "acknowledgment" of a will within the Wills Act (sect. 9)? The witnesses must either see or have had it in their power to see the signature (Jarm. Wills, vol. i., p. 108, 4th ed.). It would not be enough if the testator said, "my signature is inside there," unless the attesting witnesses actually saw it.

Hudson v. Parker (3 Robert. 25) is clear, and we approve it.

Beckett v. Howe (39 L. J. R., P. & M. 1; L. R., 2 P. & D. 1) we disapprove. Lord Penzance there lays down that if the testator acknowledges the paper to be his will, and his signature is there when the witnesses hear this his acknowledgment, it is sufficient. I dissent from that. It will not do, although it is in fact signed, if the witnesses did not see the signature.

Gwillim v. Gwillim (3 Sw. & Tr. 200) does not contain the doctrine which Lord Penzance says it contains, for there Sir C. Creswell concluded that in fact the signature was made in the presence of the witnesses.

**Harlock v. Ashberry.**

[51 L. J. R., Ch. App. 394; L. R., 19 Ch. Div. 539.]

A foreclosure action is an action to recover land within 7 Will. 4 & 1 Vict. c. 28, which is additional to and explanatory of the Statute of Limitations, 3 & 4 Will. 4, c. 27.

A payment, by a tenant, to the mortgagee of rent of the mortgaged premises is not a payment within the Act of principal and interest coming within the Act. Such a payment must be one by the mortgagor or by some person bound or entitled to pay principal or interest on his behalf. Payment of rent of part of a property in mortgage does not keep alive the right

of distribution—who might be a person mortgaged property
tor's death. . paid.

The M. R. : The question rests on principle of all the Statutes
take? The gift to all the . . . ment to take a case out of the
issue of such of them as r . . . by a person liable as an acknow-
bution, cannot be read . . . this was only a payment which the
then living, and the . . . bound to make. There is no appro-
dead. The son . . . towards principal and interest (as between
share independ . . . mortgagee) until the final result of the
period of . . . between them is known. Expenses may
If the : . . the rents received. The doctrine of ratifica-
under . . . the tenant's payment by the mortgagor would not
the . . . the original character of the payment could not be
“ . . . as between mortgagor and mortgagee.

Waller v. Loch.

[51 L. J. R., Q. B. App. 274; L. R., 7 Q. B. Div. 619.]

A society for the suppression of mendicity communicated
to persons who made inquiries respecting the plaintiff, with
the view of assisting her or recommending her to others,
certain reports which the plaintiff alleged were libellous. She
brought this action for the libel. Held that the reports were
published in the discharge of a moral and social duty, and
were therefore privileged.

Davies v. Sneed (39 L. J. R., Q. B. 262; L. R., 5 Q. B. 608)
approved. J. Blackburn there concisely states the law to be
that where a person is so situated that it becomes right, in the
interests of society, that he should tell to a third person cer-
tain facts, then if he, *bonâ fide*, and without malice, does tell
them, it is a privileged communication.

Chard v. Jervis.

[L. J. R., Ch. App. 429 and Q. B. 442; L. R., 9 Q. B. Div. 178.]

M. R. : If under the Debtors Act, 1869 (32 & 33
62), the debtor can displace the *prima facie* case in
} means made by the judgment creditor, and each
} or explains in detail to the satisfaction of the Appellate
Court that he has no means except the amount which his wife
may feel disposed to allow out of her separate income, no
order for committal will be made.

Harper v. Scrimgeour (L. R., 5 C. P. Div. 366), not followed.

The expression of L. J. James in *Esdaile v. Visser* (L. R.,
13 Ch. Div. 421), that an "overwhelming" case was necessary
to induce the Court of Appeal to differ from the Court below,
qualified.

***In re Tanqueray-Willaume and another to Landau.***

[51 L. J. R., Ch. App. 434; L. R., 20 Ch. Div. 465.]

The M. R. : The first question is, under what circumstances
there is a charge for the payment of debts created by the
direction to pay debts out of a freehold estate. "Where
there is a direction that the executors shall pay the testator's
debts, followed by a gift of all his real estate to them, either
beneficially or on trust, all the debts will be payable out of
all the estate so given to them. The same rule applies
whether the executors take the whole beneficial interest, as in
Heuvel v. Whitaker (3 Russ. 343), or only a life interest, as in
Finch v. Hattersley (3 Russ. 345, n.), or no beneficial interest
at all, as in *Hartland v. Murrell* (27 Beav. 204)." Fry, J., in
Bailey v. Bailey (48 L. J. R., Ch. 628, 629; L. R., 12 Ch.
Div. 268, 273)—That is a correct statement of the law.

Here, and in all the cases where there is a devise of the
legal estate to the executors, you can give the legal estate.
There is no distinction between such a charge of debts, with
the implied power of sale which follows from it, and a trust
for payment of debts where the legal estate is expressly

devised to trustees for the purpose of making such a payment. In these cases, where the death is recent, you do not inquire whether there are debts to pay or not. You say to the trustee, "You have the legal estate," and if you have not inquired, and have no notice that the debts are paid, you are quite safe. So where you have a charge of debts with an implied power of sale and get the legal estate, you would be protected by equity whether there are debts or not. The purchaser is quite safe. There is much in this will to show that the trustees do take the legal estate. (1) There is the devise to the wife and son as trustees of "all real estate whatsoever and wheresoever of or to which I or any other person or persons in trust for me is or are seised or entitled." That is, he includes a freehold estate of which he has only an equitable estate. *Possession* was therefore intended to be given. Then the will continues: "To hold the same unto them, their heirs and assigns, upon trust to pay the rents, &c. unto or permit the same to be received by my wife during her life," and then, after her death, to raise and pay certain legacies, and then the residue is given to the son with power to him to postpone payment of the legacies for two years after the wife's death.

Doe v. Biggs (2 Taunt. 109) was cited to show that the wife would take the legal estate. That case was simply decided on the rule that the last of two inconsistent words or clauses should be taken in a will. A decision on such narrow grounds does not bind. [The M. R. (*ante*, p. 79) had already expressed his disapproval of *Doe v. Biggs*.] Here the wife is one of the trustees. You can, therefore, give effect to both words; the other trustee could pay to her or she could receive them herself. You do not, therefore, want the above "rule of thumb." The direction to pay legacies must give the trustees some estate. The gift to the son of the residue is not a new gift of the real estate, nor is the power to him to delay payment of the legacies inconsistent with his office of trustee. The wife and son, as trustees, take the legal estate.

A direction "to my executors to pay my debts" has been held to mean a direction to pay them out of personal estate;

but if it is followed by a devise of real estate to the executors either as such or in their own name, and then it is devised, it confers a legal estate upon them, either with or without a beneficial estate. We have, therefore—(1) A good charge; (2) a good power of sale; (3) a good legal estate.

As to whether a lapse of ten and a half years will raise the presumption that there are no debts remaining, I differ from *Sabin v. Heap*, 27 L. J. R., Ch. 79; 27 Beav. 553. But only on that point do I differ from that case. In my opinion the reasonable time is twenty years. Within that time a purchaser will be safe in taking a title from the executors. After that they should expressly inquire and get evidence of the existence of debts such as will justify the sale.

Briggs v. Massey.

[51 L. J. R., Ch. App. 447; 30 W. R. 325; 46 L. T. 354.]

New shares allotted in respect of original shares forming part of a trust estate, being accretions to the original shares, become part of the trust estate. The allotment is subject to calls, and these calls have been paid. The loss to the residuary estate from the default of the trustee in not getting in such shares, which formed part of such residuary estate, is the amount of the shares less the sum paid for calls.

***In re* Claggett, Fordham v. Claggett.**

[51 L. J. R., Ch. App. 461; L. R., 20 Ch. Div. 134.]

The disallowance of a creditor's claim brought in under an administration judgment is a "refusal" within the meaning of Ord. LVIII. r. 15 (1875), from which an appeal can be brought without drawing up any order.

Ex parte Richdale and another, In re Palmer.

[51 L. J. R., Ch. App. 462; L. R., 19 Ch. Div. 409.]

The M. R.: At the time when a post-dated cheque was given in payment an act of bankruptcy had been committed by the payee, but the givers of the cheque had no notice of this. Consequently the dealing was in good faith, protected by sect. 94, sub-s. 3, of the Bankruptcy Act, 1869. It was the giving of that which, in law, is a bill of exchange for the balance of purchase-money due to the debtor. There is no obligation on a person paying by bill of exchange to refuse payment of the bill if the payee becomes bankrupt, or to direct the drawer not to pay it.

Biscoe v. Jackson.

[51 L. J. R., Ch. App. 464.]

A bequest of 2,500*l.* out of pure personalty to be applied by the trustees, so far as they lawfully could without violating the laws against mortmain, as to a sum not exceeding 1,000*l.* part thereof in establishing a chapel at A., and, as to the residue, upon certain trusts for providing a stipend for the minister of such chapel, held valid.

Jarmain v. Chatterton.

[51 L. J. R., Ch. App. 471; L. R., 20 Ch. Div. 493.]

The M. R.: An appeal lies from a refusal by a judge of first instance to commit for contempt of Court. *Ashworth v. Outram* (No. 2) (L. R., 5 Ch. Div. 943) only means that in that particular case the discretion of the Court below could not be interfered with.

COMMENT.

See also *Jervis v. Lawrence*, 52 L. J. R., Ch. 242; L. R., 22 Ch. Div. 202.

In re The General Financial Bank.

[51 L. J. R., Ch. App. 490; L. R., 20 Ch. Div. 276.]

The M. R.: The Court will not appoint an official liquidator on the hearing of a petition, but refers the appointment to chambers.

A *bonâ fide* creditor who presents a petition, without notice of a prior petition, is entitled to his costs up to the time when he has notice of the prior petition. If he has reasonable ground for doubting the *bona fides* of the prior petition he will be allowed his costs if he proceeds with his own petition.

In re Sparrow.

[51 L. J. R., Ch. App. 497; L. R., 20 Ch. Div. 320.]

An allowance made, in spite of opposition from some of the next of kin, out of the surplus income of a lunatic tenant for life of real estates, to his nephew, first tenant in tail, upon the terms of the nephew charging the estates with the sums received in respect of the allowance, the L.JJ. as protectors consenting to the barring to the extent necessary to let in the charge.

Golden v. Gillam.

[51 L. J. R., Ch. App. 503; (affirming) L. R., 20 Ch. Div. 389.]

The M. R.: Where a deed is made for valuable consideration you cannot set it aside at the instance of the creditors unless you show *mala fides*. Sometimes it has been said that a transaction is so gross that a mere statement of it shows *mala fides*. The mere fact of the whole property of the debtor being sold, and there not being enough to provide for creditors, or that some only of his creditors are provided for, is not of itself sufficient. This was intended to be an honest transaction. Circumstances rendered it undesirable for Mrs. J. to make a will. Heavy legacy duty would have been payable. She had provided for her sons. She wished to provide

for her daughters. She therefore gave them her farm in consideration of their agreeing to pay her farming debts and to maintain her as she had been maintained before. It is true that some debts, not being farming debts, are unprovided for. There is no evidence that the value was inadequate. I do not know what the farm was worth; but very little (if anything), it appears, beyond the mortgage money owing on it. The farming stock (also given to the daughters) was worth about 400*l*. We have no evidence as to the amount of the farm debts, nor as to the value of the growing crops. When reaped they paid expenses. The farm debts may have been more than the value of the chattels assigned. The transaction was not fraudulent.

In re **The Great Britain Mutual Life Assurance Society.**

[51 L. J. R., Ch. App. 506; L. R., 20 Ch. Div. 351.]

Where under sect. 22 of The Companies Act, 1862, the Court, instead of making a winding-up order, directs a scheme to be settled for the reduction of contracts, the date of the presentation of the petition is ordinarily the period at which the rights of the policy-holders and annuitants will be adjusted.

The theory is that if a company is insolvent the company's contracts may be reduced all round to the necessary extent, instead of having the expense of a winding-up. The result is advantageous to all. Policy-holders, whose claims have matured after the petition to wind up was presented, but before settlement of scheme for reduction, suggest that they should be paid in full—but why? If the winding-up had proceeded they would only have got a dividend.

Union Bank of London v. Ingram.

[51 L. J. R., Ch. App. 508; L. R., 20 Ch. Div. 463.]

The Court may, under the 44 & 45 Vict. c. 4, s. 25, sub-s. 2 (Conveyancing and Law of Property Act, 1881), make an order for sale before the foreclosure has become absolute.

**Turner v. Hancock.**

[51 L. J. R., Ch. App. 517; L. R., 20 Ch. Div. 303.]

The M. R. : A trustee is entitled to his costs out of the trust fund, unless he has forfeited them by some misconduct. *Cotterell v. Stratton* (42 L. J. R., Ch. 417; L. R., 8 Ch. 295), Lord Selborne. The rule, which in *In re Hoskins' Trusts* (46 L. J. R., Ch. 817; L. R., 6 Ch. Div. 281), L. J. James thus laid down: "the case where a trustee has been deprived of his costs for impropriety of conduct is no exception from the general rule that an appeal for costs will not lie," conflicts with the above, and we disapprove of what L. J. James there said. The appeal lies. Ord. LV. preserves the right to such costs.

COMMENT.

But this only applies where the action is one in which the trusts are allowed to continue, *i. e.*, in which the instrument containing them is maintained. If the trust deed is set aside the right to costs falls also, and an appeal will not lie (*Dutton v. Thompson*, L. R., 23 Ch. Div. 278; 52 L. J. R., Ch. App. 66).

**Ex parte Russell, In re Butterworth.**

[51 L. J. R., Ch. App. 521; L. R., 19 Ch. Div. 588.]

The M. R. : The debtor carried on a small baker's business in Manchester, with fair results up to August, 1878. He had saved money, and invested it in houses. He had furniture at his private residence. Then he contemplated taking a grocer's shop near, and actually purchased a grocery busi-

ness within a month after the settlement next mentioned. In August, 1878, he went to a solicitor and told him that he wanted to settle his property on his wife and children. A voluntary settlement was prepared, which did not leave out enough to pay his then debts without the aid of the settled property. Now the principle of *Mackay v. Douglas* (41 L. J. R., Ch. 539; L. R., 13 Eq. 106), and that line of cases, is that a man is not entitled to go into a hazardous business and, immediately before doing so, to settle all his property voluntarily, the object being this:—"If I succeed in this business I make a fortune for myself. If I fail, my creditors will bear the loss. I leave them unpaid." The settlement is bad both under sect. 91 of the Bankruptcy Act, 1869, and under 13 Eliz. c. 5.



The London and South Western Railway Company v. Gomm.

[51 L. J. R., Ch. App. 530; L. R., 20 Ch. Div. 562.]

The M. R.: The questions are—(1) Whether the railway company's deed of sale to the defendant's predecessor in title is open to objection, because the covenant, giving an option of purchase, is obnoxious to the rule against remoteness; and (2) whether the deed itself is void under the Railways Clauses Act, 1845, sect. 127.

Now the purchaser covenanted in this deed with the company that he, his heirs, and assigns, owner and owners for the time being of the land, would, at any time thereafter, whenever the land might be required for the works of the company, upon certain notice given, and upon receiving the purchase-money, re-convey to the company. [The land was such as was not wanted at the time, but would probably eventually be required.]

The covenant is unlimited as to time, and is obviously intended so to be. The very essence of the contract is that it shall be indefinite in point of time. The suggestion, founded on *Kemp v. The South Eastern Rail. Co.* (41 L. J. R., Ch. 404;

L. R., 7 Ch. 364), to insert, by intendment, a limitation, that the land should be taken before the time for executing all the works had expired, cannot be adopted here, because that time had already expired when the conveyance was executed. This is an unlimited covenant, then. Is it an interest in land? If it is a mere personal contract, of course the rule does not apply. But if only personal, the appellant could not be bound, for he did not enter into the contract. It binds the land, and amounts to [an intended] equitable interest in the land—the right to call for a conveyance. That being so, there is no distinction between one kind of equitable interest and another (unless the case falls within one of the exceptions, like charities). As to the rule against perpetuities, there is no distinction between a contract for purchase, an option for purchase, and a limitation on condition, or conditional limitation.

Gilbertson v. Richards (28 L. J. R., Exch. 158; 29 L. J. R., Exch. 213; 4 H. & N. 277; 5 H. & N. 453), and *The Birmingham Canal Co. v. Cartwright* (48 L. J. R., Ch. 552; L. R., 11 Ch. Div. 421), must be considered as overruled.

I cordially accede to the decision of the Court of Appeal in *Haywood v. The Brunswick Benefit Building Society* (51 L. J. R., Q. B. 73), that the doctrine of *Tulk v. Moxhay* (18 L. J. R., Ch. 83; 11 Beav. 571) is not to be extended to affirmative covenants. [This overrules *Cooke v. Chilcott* (L. R., 3 Ch. Div. 694).]

Then, on the second point, I think the provisions of the Railway Clauses Act mean that at the expiration of the statutory period, if the land is superfluous, the company must sell it, under penalty of losing it by its re-vesting in the adjoining owner. The fact as to its being superfluous may be determined and acted upon either during or directly on the expiration of the statutory period but not afterwards.

COMMENT.

The legalized perpetuities are—(1) Entails; (2) Gifts to charitable uses, *Christ's Hospital v. Granger* (1 M. & G. 460).



Cooper v. Crabtree.

[51 L. J. R., Ch. App. 544 ; L. R., 20 Ch. Div. 589.]

The M. R. : The plaintiff, the reversioner of a cottage let on a weekly tenancy, has abandoned all his complaints except that the defendant has put up two small poles with a small piece of hoarding to obstruct a window in the plaintiff's cottage. The defendant has a right to put up such a pole and board, his object being to prevent the acquirement of the right to light. It is only temporary, and can be moved in five minutes. It is not an obstruction. The plaintiff cannot maintain trespass, because his tenant is in possession. An injunction to restrain a trespass for which an action for trespass cannot be maintained will not be granted. The amount of injury done is a very material element as to granting injunctions.

*Ex parte* **Hall, In re Cooper.**

[51 L. J. R., Ch. App. 556 ; L. R., 19 Ch. Div. 580.]

The M. R. : If a debtor says to his creditor, "I am about to become bankrupt," or, "I shall stop payment in a week," and the creditor thereupon says, "Pay me my debt or I will sue you," this is not pressure by the creditor such as will prevent a fraudulent preference if payment is made. Of course if the creditor did not know the state of affairs it would be different.

COMMENT.

Under the Bankruptcy Act, 1883, such a notice to a creditor would apparently be an act of bankruptcy, sect. 4 (h). And see *post*.

*In re* **The German Date Coffee Company, Limited.**

[51 L. J. R., Ch. App. 564 ; L. R., 20 Ch. Div. 169.]

If the whole substratum and object of a company be removed, even a minority may successfully apply to wind it up.

(See *In re The Haven Gold Mining Co.*, 51 L. J. R., Ch. 242, *ante*.)

The M. R.: "It is exactly like *Baring v. Dix*" (1 Cox, 213). The shareholders who seek the order may say, "We did not enter into partnership on these terms."

Worsley v. Swann.

[51 L. J. R., Ch. App. 576.]

An application for injunction against the construction of buildings in the course of erection which are seemingly only adapted for a user which, if it takes place, will be in breach of a covenant, must not be made until such user has taken place.

Suffell v. The Bank of England.

[51 L. J. R., Q. B. 401; L. R., 9 Ch. Div. 555.]

The M. R.: Important distinctions exist between a Bank of England note and an ordinary promissory note.

No doubt has ever been raised as to the validity of the second resolution in *Pigot's Case* (11 Rep. 26, *b*). The alteration which will avoid the instrument must be in a point *material*. That resolution applies only to deeds, but the principle has been extended to instruments not under seal (*Master v. Miller*, 4 T. R. 320; 5 *ib.* 367 (1791).)

It is suggested that an alteration is not "material" within the rule unless it *affects the contract*. But there are many cases where there is no contract. Then it is said that, in a case where rights are conferred otherwise than by contract, those rights must be affected by the alteration. Whether any rational person could say that anything not affecting the contract could be treated as material, it may hereafter become necessary to consider. Thus, it may be said that the number put on a bill of exchange or a cheque may not alter the contract; but as to a company's debenture, a turnpike trust bond or one of a foreign government, or of an English municipal

corporation, where the bonds would be paid according to numbers drawn by lot, the contract would be affected not on its face but in another way. The special nature of the contract must therefore be considered with reference to the effect of the alteration in it.

A Bank of England note is not an ordinary commercial contract to pay, but is a part of the English currency; it is a legal tender for any sum above 5*l.*; it must be issued for a certain amount of bullion (7 & 8 Vict. c. 32, s. 4), and any one may demand it to use it as currency. It is protected specially against mutilation and alteration.

The numbering of these notes has dated from a very long period. The person bringing bullion under the above statute is entitled to notes in the ordinary form, and this includes numbering. Again, the number is useful to trace notes.

I do not agree with *Caldwell v. Parker* (Ir. R., 3 Eq. 519, 526).

Gandy v. Gandy.

[51 L. J. R., P. 41; L. R., 7 P. Div. 168.]

The M. R.: A separation deed was executed between husband and wife, after adultery by the husband known to the wife, the origin of the separation being the husband's adultery. The husband covenanted to provide for the maintenance of the children and to allow the wife 252*l.* a year, and she covenanted not to demand more, &c. Subsequently the husband again committed adultery, and then the wife obtained a judicial separation. One of her objects was to obtain the custody of the two younger children (girls), and another, doubtless, to obtain increased alimony, the husband's fortune having increased by a successful invention. The judge below decided that she was entitled to increased alimony.

The contract made by the deed is not affected by the subsequent adultery. The husband would be liable under it even if the wife had committed adultery. The legislature

has not given the Court, in cases of judicial separation, the powers to vary post-nuptial and ante-nuptial settlements which it has in cases of dissolution of marriage.

The Court cannot allow the alimony which it thinks just, because it has no power to set aside the deed or stop an action against the husband on it, supposing it thought the alimony ought to be less than the amount covenanted to be paid. Can we, therefore, increase the allowance? Unless one of the parties had so acted as to disentitle himself or herself to rely on the contract at all, why should the Court interfere with it? The reason founded on public policy is about the most dangerous to give. The misconduct of the husband subsequent to the deed has not affected the position of the wife under the contract. The fortune of the husband might have diminished, but his covenant would have bound him. It is, therefore, unaffected.

The Att.-Gen. v. The Guardians of the Poor of the Union of Dorking.

[51 L. J. R., Ch. App. 585; L. R., 20 Ch. Div. 595.]

Glossop v. The Heston and Isleworth Local Authority (49 L. J. R., Ch. 89; L. R., 12 Ch. Div. 102) is substantially in point here. There (and I assume here) the sewers were vested in the local authority. Then there, as here, certain persons proved by twenty years' user the right to send their sewage down these sewers so vested. There, as here, the nuisance arising from user by other people than those having the right, was gradually increasing. The plaintiff complains of this additional pollution of his stream into which the sewage goes.

(1) Would the plaintiff have a right of action at common law, irrespective of these Public Health and Rivers Pollution Acts?

(2) If not, does the Rivers Pollution Act, or any other, give him such a right?

As to (1) the sewers are only vested in the local authority

for a very limited ownership. A landowner through whose land a sewer ran could stop it without asking anyone, but the local authority could not. I think the landowner would be allowed an injunction as against those persons not having the prescriptive right, because if they went on for twenty years they would get a right. It would be permanent injury to his property. But if he does not care to get an injunction, those who have land below him and are affected cannot compel him to do so.

You are not to enjoin a man, or corporation, under the penalty of sequestration of his property (there are other penalties as regards individuals), to prevent a certain state of things unless you are aware of any means by which he or they can stop that state of things (L. J. Cotton in *Glossop's case* (*supra*)). And the Court always looks at the balance of convenience. If the defendants in due course neglect to put in force their parliamentary powers to remedy that which they have not caused, but which now exists, a remedy would be found for the plaintiff [who was interested in a stream, the pollution of which was being increased by increasing discharges].

COMMENTS.

Other decisions of the M. R. on this matter are *Taylor v. The Corporation of Oldham* (4 Ch. Div. 411) and *Roderick v. The Aston Local Board* (5 Ch. Div. 328). The right to lateral support of the sewers is a matter left in doubt. See *In re an Arbitration between Corporation of Dudley and the Earl of Dudley* (8 Q. B. Div. 86). Brett, L. J., thought the right was not to be implied. Cotton, L. J., thought the easement might have to be purchased by the authority, but the M. R. thought it existed already (*Roderick v. Aston*, *sup.*). The Support of Sewers Amendment Act, 1883, now provides for this. In *Charles v. Finchley Local Board*, L. R. 23 Ch. D. 767 (52 L. J. R., Ch. 89), Pearson, J. pointed out that if the person or authority complained of could physically abate the nuisance, an injunction would go against him.

Smith v. Chadwick.

[51 L. J. R., Ch. App. 597; L. R., 20 Ch. Div. 27.]

The M. R. : If a man has by carelessness made untrue statements, the untruth of which he ought to have known, he is liable for an action of deceit. He does not escape because he may have had no intention to defraud. If the statement is one which on its face would tend to induce a person to contract in reliance on it, the inference is that he so relied. You want no evidence to that effect. Escape from the consequences can only be by showing (1) that the fact was known before contract made, or (2) that, avowedly, no reliance was placed on the statement (*Brounlie v. Campbell*, L. R., 5 App. Cas., 925). If the statement in question appears to the Court to be ambiguous the plaintiff must say in which sense he understood it. If the defendant made the statement in good faith, and with reasonable ground for believing its truth, he is protected. So if the statement is trivial, and such that the Court thinks it could not have affected the plaintiff's mind, or induced the contract; or if the means of ascertaining the untruth of the statement were, although within the defendant's knowledge, yet such as required careful investigation, and there was reasonable ground for believing what was stated, the defendant would succeed.

Teevan v. Smith.

[51 L. J. R., Ch. App. 621; L. R., 20 Ch. Div. 724.]

[The omission held to exist in this case in the Conveyancing and Law of Property Act, 1881, was supplied by the 45 & 46 Vict. c. 39, s. 12, extending the right to enforce an assignment of the mortgage instead of re-conveying it, notwithstanding any intermediate incumbrance, with due regard to priority to the requisition of an incumbrancer over that of the mortgagor and to the priorities of incumbrancers as between themselves.]

In re Jelley & Co.'s Application cited

[51 L. J. R., Ch. 639, n. 46 L. T. 381, n. and followed by North, J., in *In re Braby's Application*, 51 L. J. R., Ch. 637; L. R., 21 Ch. Div. 223.]

Under the Trades Marks' Registration Act, 1875, a new mark may be registered for some of the goods in a class although a similar old mark has been already registered for other goods in the same class, if the goods are so distinct as to prevent confusion arising.

COMMENT.

See 46 & 47 Vict. c. 57, ss. 65, 66, &c.

The Prison Commissioners v. The Clerk of the Peace for Middlesex.

[51 L. J. R., Q. B. 433; L. R., 9 Q. B. Div. 506.]

The M. R.: The justices are parties to, and therefore bound by, this conveyance to the clerk of the peace in trust for the purposes of the Prison Act, 1875, and therefore by the statement contained in it as to the objects of the purchase. As the only purpose for which land can be purchased under the Act (sects. 23 and 44) are prison purposes, the land passes to the Prison Commissioners under sects. 48 and 60 of the Prison Act, 1877, without payment.

Jenkins v. Jones.

[51 L. J. R., Q. B. 438; L. R., 9 Q. B. Div. 128.]

Cotton, L. J., delivered the judgment herein, but the M. R. concurred in it.

It was argued that the 8 & 9 Vict. c. 106, s. 6, which enables contingent and other like estates to be disposed of by deed, impliedly overruled 32 Hen. 8, c. 9, s. 2, which prevents the sale and purchase of "any pretended rights or titles, or

the taking, promising, granting or covenanting to have any right or title of any person" to any lands, &c., unless the grantor, or those by whom he claims, have been in possession of the same or the reversion thereof "by the space of one whole year next before" the grant made.

Held, that the statute of Henry only applied to fictitious titles which could not be conveyed at common law; that by the 8 & 9 Vict. c. 106, s. 6, a right of entry may be alienated, so that now a right or title good in fact may be alienated.

**The Queen v. The Mayor and Treasurer of
Birkenhead.**

[51 L. J. R., Q. B. 444.]

The Commissioners' Court for trial of a municipal election petition under 35 & 36 Vict. c. 60, is a Court of Record, the judgment whereof can only be proved by the record; a treasury certificate requiring the expenses of the Court to be paid by the borough is a ministerial and not a judicial act, and therefore can be cancelled and varied; the borough may, under sect. 60 of the Act, make a retrospective rate to pay these expenses.

In re Ovey, Broadbent v. Barrow.

[51 L. J. R., Ch. App. 665; L. R., 20 Ch. Div. 676.]

A testator directed his executors to pay his debts, gave numerous pecuniary legacies, and then bequeathed "all his personal estate and effects of which he should die possessed, and which should not consist of money or securities for money," to R.; and then gave the residue and remainder of his estate, real and personal, to trustees upon trusts, to pay two special legacies, and then directed that the legacy duty and charitable legacies should be paid out of pure personalty, the charitable legacies to be paid in priority of all other bequests.

The M. R. : In *Bothamley v. Sherson* (44 L. J. R., Ch. 589;

L. R., 20 Eq. 304, *ante*) I meant to be understood to say that you cannot call a general residue a specific legacy because a specific legacy has been given out of it. It makes no difference whether a specific legacy, *e.g.*, a white horse, is given out of residue in the first instance, or excepted from the gift. Is the gift to R. specific or residuary? In the latter case the pecuniary legacies are payable out of it. The direction to pay debts and the gift of pecuniary legacies both imply payment out of personalty. The gift to R. is not a gift of a "distinguished part" as excepted from the whole. There is nothing in the will exonerating the general personalty from ordinary liabilities. True that the residuary bequest to the trustees includes the excepted "money and securities for money," but they were not to be the only fund to pay debts and legacies. The charitable legacies are to be paid out of the "pure personalty," which includes the gift to R. If so, why not the other legacies and debts? The gift to R. is not specific, and she cannot take anything until the debts and legacies are paid.

In re **Hall Dare's Contract, &c.**

[51 L. J. R., Ch. App. 671; L. R., 21 Ch. Div. 41.]

The 70th section of the Conveyancing and Law of Property Act, 1881, protects a purchaser under order of the Court against any defect in the order, even on its face, *e.g.*, a defect from not naming the persons entitled in remainder, with whose concurrence and consent the Court dispensed.

In re **J. B. Palmer's Application,**

[51 L. J. R., Ch. App. 673; L. R., 21 Ch. Div. 47.]

The M. R.: Neither the 3rd nor the 5th section of the Trades Marks Registration Act, 1875, restricts an application for rectification of the register to five years from the registration sought to be rectified.

If the registrar registers that which is not in fact a legal trade mark, that registration does not confer validity on the trade mark after the five years have elapsed. Evidence as to the fact whether the mark was originally a valid one or not is therefore admissible.

[See Part IV., 46 & 47 Vict. c. 57.]

Ex parte **Solomon, in re Tilley.**

[51 L. J. R., Ch. App. 677; L. R., 20 Ch. Div. 281.]

A creditor present at a liquidation meeting may have a shorthand writer present to note examination of the debtor.

If leave for such presence is refused by the meeting the resolutions ought not to be registered. The Court would order a fresh meeting to be summoned.

In re **Martin, Hunt v. Chambers.**

[51 L. J. R., Ch. App. 683; L. R., 20 Ch. Div. 365.]

According to the present practice and rules either party may as of right demand a jury, subject to the judge's discretion, under Rule 26, Ord. 36. The party objecting must show sufficient reason for his objection. The Court will, where a jury is ordered, generally transfer the cause to the Queen's Bench Division.

James, L. J., in *Ruston v. Tobin* (10 Ch. Div. 558, 565), must not be understood to have laid down a general rule against entertaining an appeal from a judge's exercise of a discretion vested in him.

Ex parte **Leslie, in re Guerrier.**

[51 L. J. R., Ch. App. 689; L. R., 20 Ch. Div. 131.]

The M. R.: If a debt for which certain forged bills are taken as security was not originally founded on any felony,

although one of the inducements to lend was the security of the bills, the lender can prove for or recover the debt without prosecuting for the felony.

COMMENT.

The principle that the criminal remedy must be adopted before the civil one, has, at any rate in cases where no intention to compound to pardon the offence is shown, been so refined upon and avoided in recent cases that it can scarcely be said to be strong ground. See *Wells v. Abrahams* (41 L. J. R., Q. B. 306; L. R., 7 Q. B. 554) and *Ex parte Elliott* (3 Mont. & Ayr. 110).



The New London and Brazilian Bank (Limited)
v. Brocklebank.

[51 L. J. R., Ch. App. 711; L. R., 21 Ch. Div. 302.]

The articles of a limited bank provided that the company should have a paramount lien and charge upon all the shares of any shareholder for all moneys owing to the company from him, alone or jointly with any other person, and that when a share was held by more persons than one, the lien and charge should exist in respect of all moneys owing from all holders, either alone or jointly with others. Trustees of a settlement (so authorized by the *cestuis que trust*) purchased with the trust money shares in the company. One of the trustees was a partner in a firm which subsequently went into liquidation, being then indebted to the company.

The M. R.: The charge of the bank is first in right and first in time. The registration of the shares was on the terms that whenever the person registered owed any money to the bank there should be an equitable charge on the shares. The contract was perfect the moment the shares were registered. The title of the *cestuis que trust* cannot therefore be prior. So, from the nature of the claim, that of the bank must be prior. The *cestuis que trust* bought, in the name of the trustee, property subject to a charge in a given event. They cannot get the benefit of the purchase and yet not comply with its terms.

If *cestuis que trust* authorized their trustee to take a farm on the terms that the landlord should have an equitable charge for the time being for his rent, the farm could not be kept without payment of the rent.

Tucker v. Linger.

[51 L. J. R., Ch. App. 713; L. R., 21 Ch. Div. 18.]

The M. R. : An agricultural custom need not be shown to have existed from time immemorial, only during a reasonable time. I conclude here that there is a local custom in this [Surrey chalk hill] farm for tenants to take away flints turned up in the ordinary course of husbandry and to sell them. The land is benefited, and it is not unreasonable that he who has the trouble of removal should sell the flints for his own benefit. The particular exception here of "minerals, sand, quarries of stone, brick earth and gravel pits," does not exclude the custom, although, irrespectively of the existence of a clear custom, the word "minerals" would include flints and everything else of a mineral character. (*Heat v. Gill*, 41 L. J. R., Ch. 761; L. R., 7 Ch. 699.)

In re Speight, Speight v. Gaunt.

[51 L. J. R., Ch. 715; 52 L. J. R., Ch. App. 505; L. R.,
22 Ch. Div. 727.]

The M. R. : A trustee ought to conduct the business of the trust in the manner in which an ordinarily prudent man of business would conduct his own affairs. Beyond that there is no obligation. What are the usual precautions taken by men of business when they invest? If it is an investment made usually on the Stock Exchange through a stock broker he selects a broker of good repute and credit, having regard to the sum to be invested, and directs him to purchase on the Stock Exchange from another broker. In the ordinary course

all that the broker can do is to enter into a contract for the next account day. By special bargain, of course, it may be for cash, or for any other day. Before the account day arrives the purchasing broker obtains from his principal the amount, because on the account day he is himself liable to pay over the money to his vendor. He sends a copy of the purchasing note to the principal to say when the money is wanted. When he gets it he pays it over to the vendor if it is a single transaction. If it is one of several transactions he may have either to pay or to receive. After payment—often several days after it—he gets the securities perfected. If they are railway share transfers there is often some time before they are lodged. In all cases, except as to consols and some few other cases, there is an interval.

If, therefore, the trustee has properly selected a broker, paid him the money on the bought note, and, by default of the broker, the money is lost, it does not appear to me that the trustee can be liable. Where the trustee must necessarily or according to ordinary usage employ an agent, his only liability then is to employ an agent who may be reasonably presumed to be a suitable one.

The broker employed here was a young man who had come into his father's business, his father also having been a stock and share broker at Bradford in considerable business. The young man had for more than three years been in business, and was of good credit, and had a large business. The *cestuis que trust* asked the trustee to employ him, as he was a friend of theirs. The particular investments required could, it appears, have been obtained by the trustee direct from the corporation of issue. But he was entitled to employ a broker, even if this were so. He is not liable for a misapplication, from no fault of his, on the part of the broker.

[L. J. Lindley questioned *Hopgood v. Parkin* (L. R., 11 Eq. 74).]

COMMENT.

An appeal has been heard in the House of Lords, but judgment is not yet delivered. In *Re Bellamy, &c.* (47 J. P. 550), a

decision that sects. 8 and 56 of the Conveyancing Act, 1881, do not apply to sales by trustees, Cotton, L. J., expressed his agreement with the above decision, so that it is strongly supported.

In re **Fussell, Ex parte Allen.**

[51 L. J. R., Q. B. App. 724; L. R., 20 Ch. Div. 341.]

A disclaimer of a lease of land and chattels held at one entire rent operates as a surrender of the land and chattels—*i. e.*, of the whole lease. The trustee cannot disclaim the lease and yet take the chattels. The object is to relieve the trustee from liability altogether.

COMMENT.

See 46 & 47 Vict. c. 52, s. 55.

Webber v. Lee.

[51 L. J. R., Q. B. 485; L. R., 9 Q. B. Div. 315.]

The M. R. : A right to shoot game and to take it away when shot for the benefit of the person having the right, is an interest in land—a right of profit *à prendre*. The plaintiff, lessee of the right of shooting here, agreed to give such a right in the shape of one-fourth share of the shooting. That is within the Statute of Frauds (sect. 4).

Hurst v. Hurst.

[51 L. J. R., Ch. App. 729; L. R., 21 Ch. Div. 278.]

A testator gave freeholds and leaseholds on trust for A. for life, then to be conveyed to A.'s children on his death in equal shares as they respectively attained twenty-one, with a gift over if none attained that age, and directed that A.'s life interest should become absolutely forfeited on alienation or bankruptcy, and that in that case the gift to the children

should be accelerated. The will contained a residuary clause which carried the leaseholds but not the freeholds. A. was the testator's heir-at-law, and was a bachelor. He charged his life estate in the freeholds.

The M. R. : The charge effected by A. on his life interest is within the very terms of the will. As to the freeholds the heir-at-law (A.) takes them in that capacity until he dies or a child is born. There is an intestacy until the birth of a child or the death of the son, the heir-at-law meantime taking the rents. *Doe d. Bloomfield v. Eyre* (18 L. J. R., C. P. 284; 5 C. B. R. 713), followed by V.-C. Kindersley in *Robinson v. Wood* (27 L. J. R., Ch. 726), applies. The rents of the leaseholds pass to the residuary legatee.

Ex parte **Pitt**, *In re* **Gosling**.

[51 L. J. R., Ch. App. 733; L. R., 20 Ch. Div. 308.]

The Court will, where it appears so desirable, close a bankruptcy where there are no assets, and further proceedings are useless, although sect. 47 of the Bankruptcy Act, 1869, does not provide for the case of failure of assets. If under sect. 71 the Court re-opens a bankruptcy after it has been closed, notice will be given to creditors whose debts have been contracted since adjudication, and they will be allowed to prove as creditors against property acquired after the close of the bankruptcy.

In re **Ward**, *Ex parte* **Ward**.

[51 L. J. R., Ch. App. 752; L. R., 20 Ch. Div. 356.]

The M. R. : The debt here is due from W. as broker, he, according to the rules of the Stock Exchange, being liable as principal to the jobbers to whom it was due.

The transaction was in the shares of a new company, and conditional on a special settling day being fixed. It is suggested that the debt accrued by reason of a settling day having been fixed, so fulfilling the condition. But it is said

that the fixing was obtained by fraud. I will so assume for present purposes, but if it was that could only affect participants in the fraud. The jobbers were not such participants. According to the rules of the Stock Exchange, when a member is declared a defaulter the official assignee of the Exchange closes his accounts, gets in all the sums due to him on that premature closing, and distributes what he so receives among the creditors, not only Stock Exchange creditors, but others, if they choose to come. It is suggested that after such distribution the defaulter is absolutely released from the balance of his debts. This is not so. The payments are only, in legal effect, on account. There is neither release nor accord and satisfaction. If there is a rule of the Stock Exchange that Stock Exchange creditors cannot sue without certain assents, the absence of such assents would not destroy the debt.

If there is an order for stay of proceedings on a debtor's summons pending trial of an action for the debt, the Court will, in considering whether security should be given, consider the solvency of the alleged debtor and the nature of the defence intended—*i. e.*, whether it is probably good.

In re Reynolds, Ex parte Reynolds.

[51 L. J. R., Ch. App. 756; L. R., 20 Ch. Div. 294.]

The M. R.: The mere statement by a witness that in his belief his answer to a question would tend to criminate him, does not shield him from answering. The judge must decide as to the probable tendency of the answer.

Reg. v. Boyes (30 L. J. R., Q. B. 301; 1 B. & S. 311) is in point.

Ex parte Vanderlinden, In re Pogose.

[51 L. J. R., Ch. App. 760; L. R., 20 Ch. Div. 289.]

According to the present bankruptcy law and practice (Act and Rules of 1869), the omission by a secured creditor to mention in his petition that he is ready to give up his security, is a mere "formal defect," amendable as such.

[See sect. 6, sub-sect. 2, Bankruptcy Act, 1883. Probably the above would be followed.]

Glen v. Gregg.

[51 L. J. R., Ch. App. 783; L. R., 21 Ch. Div. 513.]

The M. R.: The 18 & 19 Vict. c. 81, s. 9, exempts from the operation of the Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), buildings duly registered and *bonâ fide* used as places of religious worship. Therefore the sanction of the Charity Commissioners need not be obtained prior to commencing an action to administer the trusts of a deed which regulates the worship at such a building.

The later Act was not cited to Lord Chelmsford in the *Attorney-General v. Sidney Sussex College* (15 W. R. 162), and therefore that case must be considered as overruled.

Morgan v. Thomas.

[51 L. J. R., Q. B. 556; L. R., 9 Q. B. Div. 643.]

A testator, who died in 1834, devised land to his son "during his natural life, and after his decease to his lawful issue and their heirs for ever, if any; and if he should die without leaving any children" then over.

The M. R.: The question could not arise under the new law. The words "during his natural life" have been disregarded in cases coming under the rule in *Shelley's case*, but are important. The gift is to the issue and their heirs for ever, which will give them an estate in fee, and "lawful issue" is

used with "their," and is therefore plainly plural. The testator thought they would take together. "Issue" popularly means children; technically it may mean "descendants." "Children" has the same popular and legal meaning, but you may have a context showing a different meaning. So as to any other word in the language. I have used rather a ridiculous example in the Rolls Court, which I repeat here. Suppose a man said, "I give the black cow on which I usually ride to A.," and he rode on a black horse. The horse would pass, but a modern annotator of cases would not put in the marginal note that "cow" means "horse." In some cases "or" is said to mean "and," but it never does mean "and." You correct the wrong word used by the testator by the context. "Issue" here, then, means *children*, and "children" is used in its ordinary sense. There is a long series of authorities which shows (1) that every one of the words I have referred to standing alone will not do; (2) that there are cases in which express estates for life have been held not to be sufficient indication to prevent the general rule being carried out, by giving the first devisee (the tenant for life) a larger estate than an estate for life; (3) there are cases in which the word "issue" occurs; there is one case in which "their heirs" occurs, and that is followed by a general gift over on death without issue, which probably determined the case; (4) there are cases in which the words "if any" are used, which will not do, and I have no doubt there may be a case in which a gift over on death, "without any children," will not do. But there is no case where all these things combined have been held insufficient. There is enough in *Montgomery v. Montgomery* (3 N. & Lat. 47) to cover this case if we wanted technical authority. The son took for life only.

Tempest v. Camoys.

[51 L. J. R., Ch. App. 785; L. R., 21 Ch. Div. 571.]

The M. R.: Where trustees have a discretionary authority the Court, even after decree for administration of the trusts,

does not exercise the authority against their will. It controls the authority to the extent that it will not, while a suit is pending, allow an improper exercise of it. The common illustration is the appointment of new trustees after decree and while the administration suit is pending. There the Court must be satisfied that the person whom the trustees propose to appoint is a suitable person. There may be a trust in the settlement (as I think there is here) to invest personalty in the purchase of land, with a [discretionary] power of interim investment. Such a trust is binding on the trustee, and he must not say, "I will disregard the trust, and will not invest in land at all." If he deliberately said that, it would be ground for removing him. But that is different from attempting to compel the exercise of the discretion within a limited time where the objection to a particular investment is *bonâ fide*. The testator here has moreover distinguished between a discretion and an obligation.

**Wilkinson v. Hull, &c. Railway and Dock
Company.**

[51 L. J. R., Ch. App. 788 ; L. R., 20 Ch. Div. 323.]

The M. R. : A long class of cases has established that a company cannot use its powers to effect a subsidiary object. The works proposed must be necessary for the purposes of the undertaking, or the statutory compulsory powers under sect. 16 do not arise. Taking land for the purpose of accommodation works, which the company is liable or even has power to make, is a taking of land for the purposes of the undertaking. I should have so thought irrespectively of the decisions. Sect. 16 makes it clear, because there is in it no distinction whatever between the railway itself and the accommodation works, which are classed together. The 68th sect. compels the company to make certain accommodation works. The word "necessary" in that sect. applies only to the making good of interruptions caused by the company.

If they can do this in two or three ways, surely the company is to choose in which manner they will do it. See *The Stockton and Darlington Rail. Co. v. Brown* (9 H. L., Ch. 246), Lord Cranworth's judgment (p. 256). Then *Lord Beauchamp v. The Great Western Rail. Co.* (38 L. J. R., Ch. 162; L. R., 3 Ch. 745) is an authority that such a purpose as the most convenient manner of making an accommodation work is within the Act. In that case the company bought the land in question to make an embankment. The intention to make that embankment they abandoned, the result being that if they had not wanted the land for any other purpose it would have become superfluous land; but as they wanted it to connect severed land, the case was decided on the ground that, as this would have been a valid original purpose, it was a valid application then—and they might keep it for the altered purpose. I go further than this case, and say that the land may be taken for anything which the company has power to do.

In re Pooley, Ex parte Harper.

[51 L. J. R., Ch. App. 810; L. R., 20 Ch. Div. 685.]

The purchase by anyone of debts, with a view to obtain control over the appointment of a trustee, or the purchase of debts owing by a trustee, with a view to obtain his removal or to obtain undue influence over him, is an abuse of the bankruptcy law, and where the solicitor to the trustee is cognizant of what is done in these respects he will be disallowed his costs out of the estate.

Ex parte Griffin, In re Adams (48 L. J. R., Bank. 107; L. R., 12 Ch. Div. 480), approved and followed.

Paul v. Paul.

[51 L. J. R., Ch. App. 839; L. R., 20 Ch. Div. 742.]

The M. R. : In this marriage settlement there is a trust declared of a fund which has been transferred to trustees in favour of the next of kin of the wife, and it cannot be revoked. The fact that the *cestuis que trust* are volunteers not within the marriage consideration does not enable the trustees to part with the fund. This, of course, overrules the V.-C. Malins's decision in *Paul v. Paul*, L. R., 15 Ch. D. 580; 50 L. J. R., Ch. 14.

Pitman and another v. The Universal Marine Insurance Company.

[51 L. J. R., Q. B. 56; L. R., 9 Q. B. 192.]

An insured ship was damaged during continuance of the risk by perils insured against, and was sold by the owners without being repaired. The amount required to restore her to the same condition as she was in at the commencement of the risk would have exceeded her value when repaired, wherefore no reasonable uninsured owner would have repaired her. The owners did some slight repairs for purposes of sale, and then sold the ship. They then claimed to recover from the underwriters two-thirds of the cost of the repairs estimated as necessary to put the ship in the condition in which she was before the injury.

The M. R. : The question is upon what principle ought the liability of underwriters to be determined when the ship has been damaged by the perils of the sea, and has been sold during the continuance of the risk without being repaired, in a case where the amount required to restore her to the same condition as she was in before the injury would have largely exceeded the value of the ship when repaired, so that no reasonable man would have repaired her. The underwriters are willing to pay the whole of the loss actually incurred by the owners, viz., the difference between the value of the ship

at the port of departure for the voyage, and the amount of the net profits of the sale, after deducting therefrom the amount actually expended for repairs. That, according to the judgment of Lindley, J., is the amount which they have to pay. I agree with that judgment. The owners claim two-thirds of the estimated cost of repairs required to put the ship in her condition as before injury. Two-thirds are said to be the ordinary proportion payable by underwriters on partial loss of an old ship which is not repaired. The contract of insurance is one of indemnity. As a general rule the insured must not become more rich by reason of the perils. The insured ought not to receive from the insurer a larger sum for a single partial loss than if the ship were wholly lost. Treating this as a constructive total loss, the value to be regarded is an amount equal to but not exceeding that which would be recovered on a total loss. I do not agree with all Lindley, J.'s reasons, for I think that the rights of a shipowner who actually repairs his vessel are not in all cases the same as those of a shipowner who declines to repair because the ship is not worth repairing. My judgment is confined to the latter case.

[Cotton, L. J., agreed with this judgment. Brett, L. J., dissented. The judgment was therefore affirmed.]

**The Mersey Steel and Iron Company (Limited) v.
Naylor and others.**

[51 L. J. R., Q. B. 576; L. R., 9 Q. B. Div. 648.]

The M. R.: The first question is, what acts or defaults of one party to a contract in respect to such contract will avoid the liability of the other party to the performance or further performance of such contract? If one party to a contract breaks it is the other party bound to perform it? There is no absolute rule; but the principle is properly stated in *Freeth v. Burr* (43 L. J. R., C. P. 91; L. R., 9 C. P. 208): "The true question is whether the acts and conduct of the

party evince an intention no longer to be bound by the contract." Lord Bramwell, in *Honck v. Muller* (50 L. J. R., Q. B. 529; L. R., 7 Q. B. Div. 92), apparently draws a distinction (not warranted by the authorities) between contracts partly performed and those not performed at all. In *Freeth v. Burr*, and in *Withers v. Reynolds* (4 B. & Ad. 882) there had been part performance, and in the case of *The Phoenix Bessemer Steel Co.* (46 L. J. R., Ch. 115; L. R., 4 Ch. Div. 119) the point was not argued. In *Simpson v. Crippin* (42 L. J. R., Q. B. 28; L. R., 8 Q. B. 14) the distinction was not taken; and in *Hoare v. Rennie* (27 L. J. R., Exch. 73; 5 H. & N. 19) the original contract was never performed.

By the combined operation of sect. 10 of the Judicature Act, 1875, and Ord. XIX. r. 3, the defendant in an action brought by a company in liquidation may set off by way of counter-claim a claim for unliquidated damages not exceeding the company's claim.

The mutual credit clause (sect. 39) of the Bankruptcy Act, 1869, is now (by sect. 10) imported into the winding-up of a company.

COMMENT.

See 46 & 47 Vict. c. 52, s. 38.

Wigney v. Wigney.

[51 L. J. R., P. D. & M. 60; L. R., 7 P. D. 177.]

After a final decree for dissolution of marriage the Court has, under the Matrimonial Causes Acts, 1859 and 1878, power to exclude a guilty party from all benefit, or from a partial benefit, in the settled property. The discretion of the Court is absolute. The guilt of either party is a material element for the Court in considering the proper amount of maintenance. The old practice was to allow even a guilty (impoverished) wife some maintenance; and so a husband guilty, but suffering from a physical infirmity rendering him incapable of earning his living, would also be allowed some maintenance. This property having been entirely

brought in by the wife, there being no children, and the guilty husband having a staff appointment, we shall deprive him of all personal benefit under the settlement. Provision must, however, be made for debts contracted by the husband before the separation for the joint purposes of the establishment.

Medley v. Medley.

[51 L. J. R., P. D. & M. 74; L. R., 7 P. Div. 122.]

The M. R.: It appears that the husband, who will not give information, but who has 30,000*l.* at least, had on separating from his wife agreed to allow her 500*l.* a year, and the order gives her no more for alimony.

Sect. 32 of the Divorce Act, 1857 (20 & 21 Vict. c. 85), uses the word "secure" curiously. The gross sum is contrasted with the annual sum, but both are to be "secured." "Payment" is contrasted with "security." The intention was that the gross sum was to be secured as such, not paid over at once but from time to time. The income, and perhaps part of the capital, might at stated periods, or during life, be applied for the benefit of the wife. The Amendment Act of 1866 convinces me that the word "secure" does not include "payment," for if it did the latter Act would be useless. Therefore it was not intended to order direct payment to the wife under the first Act. The husband has property on which the annuity can be secured, therefore you cannot order him to pay. The difficulty here that the husband is beyond the jurisdiction has not been dealt with by the last Act. The later Act only applies where the husband has no property on which you can, under the earlier, obtain a security. It does not enable the alternative order made here, that if the husband does not secure he is to pay a sum of money. You must go under one Act or the other.

In re Cooper, Cooper v. Vesey.

[51 L. J. R., Ch. App. 862; L. R., 20 Ch. Div. 611.]

If mortgage deeds are in fact forged, they will not pass any estate or interest beyond the beneficial interest held by the person who forges them. If such deeds purport to be executed by an absolute owner, and are so *bonâ fide* received by the mortgagee, the fact that the person executing them has the position of trustee and executor under a will, which in fact disposes of all the property included in the mortgage, does not enable the mortgagee, as against the co-trustees and executors, to claim that the deeds are good as passing any interest held *quâ* trustee and executor. The deeds must, under the Judicature Act, 1873, s. 16, be delivered up to such co-trustees and executors.

The Attorney-General v. Gaskell.

[51 L. J. R., Ch. App. 870; L. R., 20 Ch. Div. 519.]

The Judicature Acts do not affect the right to discovery. Discovery as a right includes the obtaining by admissions relief from proofs. The fact that the same admissions may be obtained at the hearing is immaterial. The object of discovery is to save expense of proofs.

Quartz Hill Consolidated Gold Mining Company v. Beall.

[51 L. J. R., Ch. App. 874; L. R., 20 Ch. Div. 501.]

The M. R. : There is jurisdiction in a proper case, upon interlocutory motion, to restrain the publication of a libel. But this must be very carefully exercised. Here (1) the alleged libel is not proved to be untrue. (2) The injunction is to restrain future publication. The circular in question has been already issued: there is no allegation of any intention to issue more. The act is therefore past and the mischief done.

(3) On its face the circular appears to be privileged. A judge should hesitate long before he decides so difficult a question as that of privilege upon an interlocutory application.

Ex parte **McGeorge**, *In re* **Stevens**.

[51 L. J. R., Ch. App. 909; L. R., 20 Ch. Div. 697.]

The Bankruptcy Act, 1869 (s. 6, sub-s. 3, and r. 65, 1870), refers the fact of trading to the period at which the act of bankruptcy is committed.

In re **Parnell**, *Ex parte* **Ball**.

[51 L. J. R., Ch. App. 911; L. R., 20 Ch. Div. 670.]

The Court of Bankruptcy will not allow its process to be used for iniquitous or idle purposes. Where there are no assets, and sixpence in the pound is proposed, resolutions to that effect will not be registered.

COMMENT.

Under the 1883 Act the Court will exercise a stronger controlling power over any proposed "scheme of arrangement." See 46 & 47 Vict. c. 52, s. 18.

Berry v. Keen.

[51 L. J. R., Ch. App. 912.]

The Court will, under the Judicature Act, 1873, s. 25, appoint a receiver in an action to recover under equitable title possession of land the title to which is disputed.

Carrow v. Ferrior, *Dunn v. Ferrior* (37 L. J. R., Ch. 569; L. R., 3 Ch. 719), and *Talbot v. Hope Scott* (27 L. J. R., Ch. 273; 4 K. & J. 96, 139), are not now law.

In re **Weld (in Lunacy).**

[51 L. J. R., Ch. App. 913; L. R., 20 Ch. Div. 451.]

A committee in lunacy to whom an allowance is made, with the indirect object of benefiting members of the lunatic's family, must not under any circumstances mortgage arrears of the allowance so as to fetter the Court in dealing with the arrears. This applies although the money borrowed is *bonâ fide* expended upon the purposes for which the allowance is made.

May v. Thomson.

[51 L. J. R., Ch. App. 917; L. R., 20 Ch. Div. 705.]

The M. R.: The Courts have gone far enough in spelling out contracts from letters when evidently both parties intended a formal contract to be prepared. This is a case of an intended sale of a medical practice. That is a sale of the introduction to patients. There is nothing else to sell. Here I think there was no contract concluded. [The M. R. also observed that he could not see his way clear to making a decree for specific performance of the sale of a medical practice, even if such sale were clearly intended to be made. The difficulty no doubt is that the introduction of patients could not be compelled.]

In re **The Quartz Hill, &c. Company, Ex parte Young.**

[51 L. J. R., Ch. App. 940; L. R., 21 Ch. Div. 642.]

An affidavit once filed cannot be withdrawn to avoid cross-examination on it.

Maspons Y. Hermano v. Mildred & Co.

[51 L. J. R., Q. B. 604.]

[Judgment of Lindley, L. J., the M. R., and Bowen, L. J., delivered by Lindley, L. J.]

As regards foreigners who buy or sell goods through

English commission agents, the law is as stated by Blackburn, J., in *Armstrong v. Stokes* (41 L. J. R., Q. B. 253; L. R., 7 Q. B. 598). In the absence of express authority the commission agent cannot pledge the credit of his foreign constituent.

Where an English merchant acts as middleman for a foreign undisclosed principal, buying or selling for him, the person dealing with the English merchant does not *prima facie* deal with an undisclosed principal. No decision goes further than that modification of the English doctrine as to undisclosed principals. The rule which allows a person who deals with an agent not known to be so to set off against his principal any debt due from his agent to the person so dealing is settled (*George v. Glagett*, 2 Sm. L. C. 118), but this rule does not apply where the person knew that the person contracting as agent was really a principal, although he did not know his name. Whether the undisclosed principal carries on business here or abroad is immaterial.

The Skandinay.

[51 L. J. R., P. D. & A. 93.]

The M. R. : The charter provides that the freight shall be "at the rate of 35s. per 180 English cubic feet taken on board as per Gothenburg custom." The Gothenburg custom of measuring props is proved, and applies here. There is no evidence at all of any custom as to loading the vessel, to which custom the respondent says reference was made.

Corporation of Birmingham v. Baker.

[46 J. P. 52.]

Sect. 257 of the Public Health Act, 1875, providing for charging improvement expenses on the interest of every owner means *according to the respective values of the ownership*.

Therefore, if property which is leasehold for 999 years is mortgaged by absolute demise, the mortgagor having only a nominal reversion, the improvement rate is chargeable on the mortgagee.

COMMENT.

Additional reason for so holding is now afforded by the provisions enabling such terms to be enlarged into fee simples. (44 & 45 Vict. c. 41, s. 65, and 45 & 46 Vict. c. 39, s. 11.)

Biggs v. Peacock.

[52 L. J. R., Ch. App. 1 ; 31 W. R. 148 ; 47 L. T. 341.]

Where there is a valid, existing, and exercisable trust for sale, the Partition Act does not apply. A trust for sale is very different from a power of sale, which is held in some cases to end where all parties become *sui juris*. If all the devisees are of age they can call for a conveyance to themselves and so end the trust.

Walsh v. Lonsdale.

[52 L. J. R., Ch. App. 2 ; L. R., 21 Ch. Div. 9.]

If under an agreement for a lease possession be now taken there are no longer two estates ; one at law, a tenancy from year to year, and the other in equity under the agreement. There is only one Court, and the equitable rule prevails. The tenant holds as if the lease had been granted. The relative rights are exactly the same as if a lease had been granted—*e. g.*, the lessee cannot complain of a distress.

Robinson v. The Local Board of Barton.

[52 L. J. R., Ch. App. 5 ; L. R., 21 Ch. Div. 621.]

The term "new street" in the Local Government Act, 1858 (sect. 34), and the Public Health Act, 1875 (sect. 157),

applies to an old country road or lane near a town which, by buildings from time to time by it, gradually becomes a street. "That is a 'new street' where there was no street before."

In re The Indian, &c., Gold Mining Company.

[52 L. J. R., Ch. App. 31; L. R., 22 Ch. Div. 83.]

As a general rule an application for security for costs of an appeal must be made before the appeal is in the paper, and within a reasonable time.

Kelsey v. Dodd.

[52 L. J. R., Ch. 34.]

A man who has allowed the defendant and several other covenantors liable to the same restrictive covenant, to break it for some time, cannot, in order to obtain special advantages against, or to annoy, one covenantor in particular, afterwards obtain an injunction.

In re Storey, Ex parte Popplewell.

[51 L. J. R., Ch. App. 39; L. R., 21 Ch. Div. 73.]

A verbal collateral agreement not to register a bill of sale is not part of its consideration, and is not a "defeasance or condition" under sect. 10, sub-sect. 3, of the Bills of Sale Act, 1878.

Eaton v. Western.

[52 L. J. R., Q. B. App. 41; L. R., 9 Q. B. Div. 636.]

The M. R.: I think *Royce v. Charlton* (L. R., 8 Q. B. Div.) was not rightly decided. We overrule it. The masters here carried on their business at Lambeth. The apprentice and his father also lived there. The father covenanted to provide his son with board, washing, clothes, and all other

necessaries. The reasonable construction of that is, that he would provide for his son at Lambeth. Then the master removes to Derby. Is it reasonable to expect the father to find his son in board and lodging at Derby? I think not. It was not a reasonable command that the apprentice should follow to Derby. The apprentice is to serve "the firm," defined to be the defendants and the successor or successors of them, and such other person or persons as might from time to time carry on the business then carried on by them either in co-partnership with or in succession to them or any of them. Afterwards the original firm dissolved and split into two, one going to Derby and the other carrying on business in London. Neither firm can therefore be said to carry on the original business.

COMMENT.

The judges properly distinguish between "in-door" and "out-door" apprentices. If the master covenants to provide for the apprentice in his own house, the reasoning of the above case would not probably apply, and the apprentice must follow the master. But the fairness even of that holding (see *Coventry v. Windal*, 1 Brownl. 67) is not apparent. The apprentice may thus be removed from the control and supervision of his parents, may not be able to see them even until the end of his term, and then has the expense of his journey home, which expense was not within the contemplation of the parties when the indenture was executed.

Quilter v. Mapleson.

[52 L. J. R., Q. B. App. 44; L. R., 9 Q. B. Div. 672.]

The 14th sect. of the Conveyancing Act, 1881, affording relief against forfeiture on breach of covenant to insure, is retrospective both (1) so as to include breaches committed before the Act, and (2) to include leases existing when the Act was passed.

Maple v. The Junior Army and Navy Stores.

[52 L. J. R., Ch. App. 67 ; L. R., 21 Ch. Div. 369.]

The M. R. : There is nothing in the Copyright Act to exclude a book consisting merely of pictures, or an illustrated catalogue without letterpress or used only as an advertisement. *Cobbett v. Woodward* (41 L. J. R., Ch. 656 ; L. R., 14 Eq. 407) we overrule.

In re Ward, Ex parte Ward.

[52 L. J. R., Ch. App. 73 ; 31 W. R. 112.]

The amount fixed by the official assignee of the Stock Exchange as that which is due from a defaulter on premature closing of his accounts is so finally fixed for all purposes, and affords a good debt whereon to petition a bankruptcy.

**The Official Liquidators of The Blackburn, &c.,
Benefit Building Society v. Cunliffe & Co.**

[52 L. J. R., Ch. App. 92 ; L. R., 22 Ch. Div. 61.]

[Judgment of Selborne, L. J., Jessel, M. R., and Cotton, L. J.]

If money is advanced to a benefit building society upon a memorandum disclosing purposes not authorized by the rules, the claim, so far as it depends on that memorandum, fails, but so far as the money is expended in discharging the legal liabilities of the society, it will be allowed on the equitable principle laid down in *In re The Cork and Youghal Rail. Co.*, 39 L. J. R., Ch. 277 ; L. R., 4 Ch. 748. The transaction thus allowed does not add to the liabilities of the borrowers. But the onus of proving what was so applied is on the claimant, who will not for satisfying that burden have the benefit of the rule in *Clayton's Case*, 1 Mer. 572.

Ex parte Price, In re Roberts.

[52 L. J. R., Ch. App. 131 ; L. R., 21 Ch. Div. 553.]

Where a trustee under a bankruptcy, which is proceeding in a county court, is impeaching a deed as fraudulent under the Statute of Elizabeth, and questions of a serious nature as to character are involved, or the amount at stake is large, and the person interested under the deed desires that the matter be not tried in the county court, the Court of Bankruptcy would, where it has the discretion, allow the question to be tried by an action in the High Court in the usual manner.

COMMENT.

See now 46 & 47 Vict. c. 52, s. 102, limiting the county court jurisdiction in such a case (except with consent) to cases where the amount in dispute does not exceed 200*l*.

***Wallis v. Smith.***

[52 L. J. R., Ch. App. 145 ; L. R., 21 Ch. Div. 243.]

The M. R.: There is a class of cases beginning (say) for this purpose, with *Astley v. Weldon* (2 Bos. & P. 346), and ending with *In re Newman* (46 L. J. R., Bank. 57 ; L. R., 4 Ch. Div. 724), determining that where a sum of money is stated to be payable either by way of liquidated damages, or penalty for breach of stipulations all or some of which are, or one of which is, for the non-payment of a sum of money of less amount, that is really a penalty, and you can only recover the actual damage, and the Court will not sever the stipulations. If any one of the stipulations is for the non-payment of the sum of less amount, then the proviso is bad. The ground of the doctrine I do not know. Some judges say it was an extension to common law of a doctrine in equity. That is not so. Another ground may be that you can depart from the literal meaning if that leads to an absurdity. The Courts may have thought it absurd to make a man pay a larger sum by reason of the non-payment of the

smaller. I think our law as to this unreasonable, for a man may be ruined by not having the agreed sum paid at a certain day. But such is the law. The next class of cases is those in which the amount of damages is not ascertainable *per se*, but in which the amount of damages or breach of one or more of the stipulations must be, or will probably be, small. That is, so near to a "must" be small that the Court will presume the probabilities to have been so contemplated. There is no decision that the above rule applies there, but a great many dicta on each side. The point is open to discussion. It is within the principle (if principle it be) of a larger sum being penalty for a smaller, but also within the next class, viz., that in which the damages for the breach of each stipulation are unascertainable, or not readily ascertainable, but the stipulations may be of greater, less, or of equal, importance. There are dicta that if they vary much in importance the same principle applies, but there is no decision. In all the reported cases, though the stipulations have varied in importance, the sum has been treated as liquidated damages.

The last class of cases relates to deposits. Where a deposit is to be forfeited for breach of a number of stipulations, some of which may be the non-payment of money on a given day, and some of which may be trifling, the judges have held that the rule does not apply: the bargain must be performed.

According to my construction of the contract here there is no ascertainable definite sum of a less amount than the sum named payable within it, as a single condition, and consequently the decisions on that point do not apply, nor can the stipulations be considered as trifling, because there are the words "substantial breach;" therefore these dicta do not apply. But the stipulations vary in importance, and as the breach must be substantial, and the amount of damages would be substantial also, the decisions which say that in these cases the sum stipulated for is liquidated damages apply.

The M. R. then considered—(1) *Astley v. Weldon* (*supra*);

(2) *Kemble v. Farren* (7 L. J. R., C. P. 258 ; 6 Bing. 141 ; 3 M. & P. 425), which he regarded as conclusive on the general doctrine that if the clauses were limited to breaches of uncertain nature and amount, the sum mentioned would not be treated as a penalty. Rightly read, I think *Kemble v. Farren* does not go beyond *Astley v. Weldon*. (3) *Reynolds v. Bridge* (26 L. J. R., Q. B. 12 ; 6 E. & B. 528), where the L. C. J. said that *Astley v. Weldon* clearly decided that the mere magnitude of the sum named would not prevent it from being liquidated damages, and also said that there was no rule that where the sum was payable for breach of an agreement comprehending more than one stipulation it should not be taken for liquidated damages. (4) *Atkyns v. Kinneir*, 19 L. J. R., Exch. 132 ; 4 Exch. R. 776. There C. J. Tindal, and Parke, B., appear to contemplate the case where the stipulations are all of one kind. B. Parke meant (I think) that "if there be a contract, consisting of one or more stipulations, the breach of [*each of*] which cannot be measured," then the parties must be taken to have contemplated liquidated damages.

The dictum of Lord Coleridge (C. J.), in *Magee v. Lavell* (43 L. J. R., C. P. 131 ; L. R., 9 C. P. 107), "that where a contract contains a variety of stipulations of different degrees of importance, and one large sum is stated at the end to be paid on breach of performance of any of them, that must be considered as a penalty," is not supported by any decision, and is, I think, irreconcilable with principle. It is exactly opposed to what C. J. Tindal said in *Kemble v. Farren*. The mere fact of the stipulations varying in importance cannot show that the parties did not fix a sum, where the damage is not ascertainable. I am, however, bound to say that the dictum is approved by the Appeal Court in *In re Newman*, 46 L. J. R., Bank. 57 ; L. R., 4 Ch. Div. 724. L. J. James incorrectly there states that which was decided in *Kemble v. Farren*. *Galsworthy v. Strutt* (17 L. J. R., Exch. 226 ; 1 Exch. R. 659), to which Lord J. Bramwell refers, is a decision in favour of liquidated damages, where there is more than one

stipulation. *Atkyns v. Kinneir* (*supra*) is also such a decision. I wish to leave the question open where there are several stipulations, and one or more is or are of such a character that the damages must be small, but I express my opinion that there is no such doctrine as that stated by Coleridge, L. C. J., where there are several stipulations, though not of equal importance, or where there are several stipulations irrespectively of importance. I think the doctrine of *Astley v. Weldon* technically binding.

Judges should not, by overruling the contracts of adults, claim to know the business of the contracting parties better than they themselves knew it. Of course, I except the *legislative* exceptions, such as the former usury laws, and the present Factory and Mines Regulations Acts.

COMMENT.

The M. R. might have added the recent Ground Game and Agricultural Holdings Acts as instances of legislative interference with freedom of contract. So long as that interference is directed to the "greatest good of the greatest number" it may be justified, otherwise not. The same principle underlies the Artizans Dwellings Act, and the Railway and Lands Clauses Acts.



Allum v. Dickinson.

[52 L. J. R., Q. B. 190; L. R., 9 Q. B. Div. 632.]

A lessee of a house at Islington covenanted to pay "the sewers and main drainage rates . . . and other district rates and assessments whatsoever, whether parliamentary, parochial or otherwise, which now are or which at any time during the said term shall be . . . assessed on the demised premises, or any part thereof, or payable by the occupier or tenant in respect thereof."

The local authority paved a new street (under 18 & 19 Vict. c. 120, s. 105, and 25 & 26 Vict. c. 102, s. 96), and apportioned the expenses on the owners of the houses forming the new street, of which the demised premises were part.

The M. R.: Under these general words a tenant at rack-

rent is not to pay a charge of this character. It is a charge for a permanent improvement, naturally payable by the owner. *Primâ facie* the covenant by the lessee is to pay annual charges only, but this paid once for all. Again, by the acts, the charges are not assessed on the occupier, but the owner. The last-named statute (sect. 96) expressly, while making it also recoverable from the occupier, enables him to deduct it from the rent.

COMMENT.

The following cases as regards the liability between landlord and tenant to taxes will be found useful. Under a covenant to pay "outgoings" the land tax and tithe rentcharge are included. (*Parish v. Sleeman*, 1 De G., F. & J. 326.) Under a covenant to pay "all taxes and assessments" the tithe rentcharge is not included. (*Jeffery v. Neale*, 40 L. J. R., C. P. 191; L. R., 6 C. P. 240.) Under a covenant to pay rent "without deduction for any charges" the tenant must pay the tithe rentcharge. (*Lockwood v. Wilson*, 43 L. J. R., C. P. 179.)

In re Watts, Smith v. Watts.

[52 L. J. R., Ch. App. 209; L. R., 22 Ch. Div. 5.]

A mortgagee who *bonâ fide* brings in amongst other claims in his accounts a claim which is disallowed is not to be charged with costs on disallowance.

In re Exchange Banking Company (Limited).

[52 L. J. R., Ch. App. 217; L. R., 21 Ch. Div. 519.]

The M. R.: The directors for many years laid before the meetings of shareholders substantially untrue reports and balance sheets. Bad debts were therein called good debts. The business was thus falsely made to appear profitable. The meetings acting on these reports declared dividends. In fact, the directors paid those dividends out of capital. This is a summons to compel the directors to refund the sums so paid. The reason for this appeal is that *Coventry and Dixon's Case* (L. R., 14 Ch. Div. 660) is inconsistent with *In*

re The National Funds Assurance Co. (48 L. J. R., Ch. 163; L. R., 10 Ch. Div. 118). But the latter case (which if founded on some supposed new equity, under sect. 165, would not be reliable) is not so founded, but rather on the law independently of that section, and I entirely adhere to it. Looking at 40 & 41 Vict. c. 26, it is clearly not possible to return capital to shareholders except with the safeguards thereby provided. The equities on which the directors are clearly jointly and generally liable are explained in *Erans v. Coventry*, 25 L. J. R., Ch. 489; 8 De G., M. & G. 835. The directors cannot set off any amounts due from the company to them against the amount which we order them to replace.



Peareth v. Marriott.

[52 L. J. R., Ch. App. 221; L. R., 22 Ch. Div. 182.]

A direction in a will that the widow shall out of the income of a settled named fund or otherwise have a "clear annual income" of defined amount, and that "no deduction shall be made from any of the legacies given by this my will for the legacy tax, or any other matter, cause, or thing whatsoever," does not authorize deduction of the income tax.

COMMENTS.

See *Gleadow v. Leetham*, 52 L. J. R., Ch. 102; L. R., 22 Ch. Div. 269 (Kay, J.). The reporter has queried whether the decision of V.-C. Hall in *In re Bannerman, Bannerman v. Young* (51 L. J. R., Ch. 449; L. R., 21 Ch. Div. 105), must be considered as overruled. The appellate judges do not so say. In that case the annuity was to be a "clear yearly sum" of 400*l.* "free from all deductions in respect of any present or future taxes, charges, assessments, or impositions or other matter, cause or thing whatsoever." In *Gleadow v. Leetham* it is pointed out that in all the cases in which the income tax has been held not payable by the annuitant the words "tax" or "taxes" occurred, the word "deduction" being construed with reference to it. As the word occurred in *Bannerman v. Young*, but not in *Peareth v. Marriott* (*supra*), the former is not necessarily overruled. In fact, the abundant authority of *Festing v. Taylor* (31 L. J. R., Q. B. 36; 32 id. 14; 3 B. & S. 217, 235) and *Lord Lovatt v. The Duchess*

of *Leeds* (31 L. J. R., Ch. 503 ; 2 Dr. & S. 62) support it. There must, however, be the word "tax" or "taxes," or a clear reference to the income tax itself.

Kirk v. Todd.

[52 L. J. R., Ch. App. 224 ; L. R., 21 Ch. Div. 484.]

The M. R. : The rule at common law was that executors could not be sued for a wrong committed by their testator for which only unliquidated damages could be recovered. The only alteration of that rule is effected by the 3 & 4 Will. 4, c. 42. That does not apply here. The facts that the action was commenced in testator's lifetime, and that his executors continued the business in his name, make no difference.

Spencer v. The Metropolitan Board of Works.

[52 L. J. R., Ch. 249 ; L. R., 22 Ch. Div. 142.]

The M. R. : The question arises as to the meaning of the word "take" in sect. 33 of the Metropolitan Street Improvements Act, 40 & 41 Vict. c. cccxxv.

We should, if possible, find out the meaning from the section itself. If we cannot, I agree that the principle is to refer to the other parts of the act, and to accept the sense in which it is there used. I hold that the section does enable us to find that it was intended to give the board power to proceed with all necessary steps preliminary to acquiring a title and up to conveyance. As sect. 18 of the Lands Clauses Act, 1845, is incorporated, notice to treat for a number of houses in one parish occupied by labouring classes exceeding the number (fifteen) mentioned in sect. 33, and to summon a jury to assess the compensation, may be given. The conditions of the section as to satisfying the Secretary of State that sufficient accommodation elsewhere is provided for the occupants the court can compel the board to perform.

It is compulsory on the board to get new houses built on the site of the old houses included in their notice to treat. The legislature therefore must have considered that all steps necessary to enable them to do this should be proceeded with contemporaneously. The injunction granted below against proceeding before satisfying the Secretary of State, &c. must be dissolved.

Bowen, L. J., agreed. Cotton, L. J., dissented. Both these held that the word "take" included getting a conveyance from the landlord, without possession. The M. R. expressed no opinion as to that.

Loosemore v. The Tiverton and North Devon Railway Company.

[52 L. J. R., Ch. App. 260; L. R., 22 Ch. Div. 25.]

The M. R.: The effect of the decision below is that the plaintiff, owner at law and in equity of land of which he is in quiet possession, has lost his ordinary rights of ownership. If the railway company have not become owners their right to retain possession can only be by some statutory power. They have not become owners, and the statutory powers are at an end because the period (five years) fixed for completing the railway has elapsed. The 40th section of this Special Act provides for cesser of the statutory powers at the end of the time. Here there was only a notice to treat and entry under sect. 85. The mere notice to treat does not change the ownership, but only enabled the company to obtain it in taking the proper steps. The entry could only be for the purposes of the act. It temporarily deprives the owner of the right of possession, but not of ownership. Entry merely to acquire title is not a proper purpose. Again, the entry must be accompanied by *user*. If the company cannot use they cannot retain.

Ex parte St. John Baptist College, Oxford, &c.

[52 L. J. R., Ch. App. 268; L. R., 22 Ch. Div. 93.]

Money paid into Court under the Lands Clauses Act, and the Settled Estates Act, is "cash under the control of the Court," within 23 & 24 Vict. c. 38, s. 10, and General Order, 1 Feb. 1861, and may be invested accordingly.

The words mean cash standing in the name of the Accountant-General in any cause or matter. An investment may be made in East India Three and a-half per cent. Stock created since date of the order.

In re Boyd's Settled Estates (42 L. J. R., Ch. 506), and *Ex parte Rector of Kirksneaton* (51 L. J. R., Ch. 581; L. R., 20 Ch. Div. 203) overruled.

Wilson v. Turner.

[52 L. J. R., Ch. App. 270; L. R., 22 Ch. Div. 521.]

The M. R.: In this marriage settlement the husband takes no life interest. After the death of the wife the trust is that the trustees shall "apply the whole, or such part as they shall think fit, of the annual income of the share or fortune to which any child shall for the time being be entitled in expectancy under the trusts hereinbefore declared for or towards the maintenance or education," &c., of such child or children. The ordinary modern form is a power and not a trust. It is said that this settlement constitutes a contract with the father of such a kind as gets rid of the rule of equity that a provision or trust for maintenance is to be exercised for the benefit of the child and not of the father; and that therefore the father is not to be exonerated from his legal liability to maintain his child if of sufficient ability. The first decision establishing this was on a will, but the principle applies equally to a marriage settlement. *Mundy v. Earl Howe* (4 Bro. C. C. 223) decides that a trust contained in a marriage settlement, to which the father is a party, to apply the whole or such part, as the trustees may think fit,

of income for the maintenance of children is an obligatory trust, and compels the trustees to maintain the children, although the father may be able to maintain them. But where (as here) the trustees have not only a choice to apply the whole or such part as they may think fit; but "for or towards the maintenance" we have a double option; they are not bound to apply any part for maintenance. The result is that the trust is equivalent to a power. There is nothing that you can compel the trustees to do. In *Stocken v. Stocken* (7 L. J. R., Ch. 305; 4 Myl. & Cr. 95); *Meacher v. Young* (2 Myl. & K. 490), and *In re Weaver* (L. R., 21 Ch. Div. 615), there was a trust to apply the *whole* income for or towards the maintenance. Where that is so there is a trust to apply the whole accordingly, whether it is "for" or "towards" the maintenance.

Ransome v. Burgess (36 L. J. R., Ch. 84; L. R., 3 Eq. 773) (V.-C. Kindersley), we disapprove and overrule. The words there are undistinguishable from those here. The V.-C. states the case as though the words were like those in *Mundy v. Earl Howe*, but they were not.

As there is no proof of want of means on the part of the father to maintain his children, he cannot establish a claim against the trust fund in respect of it.

The principle of *Mundy v. Earl Howe* will not be extended. [Per Lindley, L. J.: It was a peculiar case, one of second marriage, the husband having already six children by his first marriage. No clause was inserted in the second marriage settlement, and Lord Loughborough held on the facts and circumstances that an obligatory trust for maintenance was created.]

COMMENT.

The judicial euphemism that "the principle of a case will not be extended" is perhaps fairly equivalent to a warning that the case will not even in future be followed. It has already been held that the case does not apply to voluntary settlements. (*Kerrison's Trusts*, C. R., 12 Eq. 422; 40 L. J. R., Ch. 637.)

In re The New Callao Company (Limited).

[52 L. J. R., Ch. App. 283 ; L. R., 22 Ch. Div. 484.]

The mere communication by an unsuccessful party to his opponent of an intention to appeal is not a notice of appeal. *Little's Case* (L. R., 8 Ch. Div. 806) and *McAndrew v. Barker* (L. R., 7 Ch. Div. 707), explained as sufficiently preserving a right of appeal where "inevitable accident" has caused the omission of notice.

The Great Western Railway Company v. The Swindon and Cheltenham, &c., Company.

[52 L. J. R., Ch. App. 306 ; L. R., 22 Ch. Div. 677.]

The M. R.: Sect. 16 of the Lands Clauses Act limits the right to take lands compulsorily conferred by the preceding sections of the Act. The statutory privileges or right of running trains over or under the line of another company is not "land" under sect. 3 of the Lands Clauses Act. The fact that the special Act (incorporating the Lands Clauses Act) authorized the taking of a right over land did not give a larger meaning to the word land, the right itself not being land [Cotton, L. J., dissallowed]. The right in question is not really even an easement.

McHenry v. Lewis.

[52 L. J. R., Ch. App. 325 ; L. R., 22 Ch. Div. 397.]

A plaintiff who contemporaneously sues both in a foreign country and here the same defendant, for the same cause of action, may be restrained from further continuing his action here on the ground of double vexation. But if in the foreign country the procedure and remedies are different, the mere fact of suing there is not evidence of vexation.

Lord Dillon v. Alvares (4 Ves. 357) is no longer law.

If the true view of the judgment in *Cox v. Mitchell* (29

L. J. R., C. P. 33; 7 C. P. R., N. S. 55) be, that you want special proof beyond the mere fact of an action abroad being co-existent to show vexation, then it does not conflict with our present judgment. If it means that in no case can the Court interfere, I do not agree with the case.

COMMENT.

See also *The Peruvian Guano Co. v. Bockwoldt* (52 L. J. R., Ch. 714; L. R., 23 Ch. Div. 225). If the only difference between contemporaneous English and French actions is that the former extends to one more subject matter than the latter, that is not evidence of vexation sufficient to stay the English action.

Sutton v. Sutton.

[52 L. J. R., Ch. App. 333; L. R., 22 Ch. Div. 511.]

The M. R. : The sole question is whether, when no principal or interest in respect of a mortgage debt has been paid, and no acknowledgment in writing has been given for twelve years, an action on the covenant contained in the deed is still maintainable. That depends on the true construction of the Real Property Limitation Act (37 & 38 Vict. c. 57, s. 8).

The origin of the former twenty years' limit was that the same period had been established as a bar to actions of ejectment, and the analogy was adopted. The doctrine was extended, and if the mortgagor remained in possession for twenty years without acknowledgment, satisfaction of the mortgage was assumed. The Statute of Limitations of Will. 4 gave the same limitation to the recovery of the mortgage debt. That did not cut down the old rule of presumption of payment. The statute did not give a remedy, but removed one then existing. Every mortgage impliedly contains within itself a personal liability to repay, whether such liability be expressed or not. This is "an action to recover a sum of money secured by any mortgage" within the statute. It is said that this only extends to the remedy against *the land*. The collocation of the word "legacy" (decided to include legacies payable only out of personalty)

gets rid of the observation that the statute was obviously and chiefly passed as to real estate. The principle always has been either (1) actual satisfaction, or (2) presumed satisfaction, or (3) creditor's delay, leading the debtor to presume that he will not be called upon to pay. Can that apply to getting rid of a mortgage and not to getting rid of the personal demand on it? You cannot lose the greater and retain the lesser. It is true that the legislature has not so provided for a bond or covenant not affecting land. It is an omission. So there is something besides overlooked. It applies to the word "legacies." This has been rightly held to include a share of residue, but only where there is an executor named. So that if no executor is named, or the man dies intestate, the statute does not apply.



In re **Ridler, Ridler v. Ridler.**

[52 L. J. R., Ch. App. 343; L. R., 22 Ch. Div. 74.]

In 1877 R. made a voluntary settlement of leasehold property worth about 200*l.* a year, held by him at a rent of 3*l.* 10*s.*, his only other property being some furniture worth 200*l.* and a debt of 1,500*l.* due to him from his son R. H. R. His only liability was that incurred under a previously-given guarantee at the bank to secure R. H. R.'s account to the extent of 1,000*l.* At the date of the settlement R. H. R.'s account was overdrawn to the amount of 1,515*l.* In July, 1880, R. H. R. filed a liquidation petition and paid 3*s.* in the £, his debt to the bank being 1,337*l.* At the death of R. (24th November, 1880) the bank commenced this action to set aside the settlement as void against creditors under 13 Eliz. c. 5.

The M. R. : As to my observations upon *Price v. Jenkins* (46 L. J. R., Ch. 805; L. R., 5 Ch. Div. 619), in *Ex parte Hillman* (48 L. J. R., Bank. 77; L. R., 10 Ch. Div. 622), I give no opinion as to whether I should have come to the same conclusion as the judges there; but, treating it as well

decided, it certainly does not apply to cases under 13 Eliz. c. 5. "Good consideration" there cannot mean that if some obligations attaching [as incident to] the property go to the new owner in exoneration of the settlor, that makes the conveyance a conveyance for valuable consideration. If that were so, a transfer of bank or railway shares not paid up, otherwise voluntary, or a settlement of large freeholds and a small leasehold involving a liability to rent, would support the settlement on the ground that in the one case the transferor is exonerated from calls, and in the other from rent.

COMMENTS.

Such a settlement is as obviously pure bounty as a gift of the property by will would be. The mere existence of an inseparable incident in the shape of a burden cannot make a transfer of the property having such incident "valuable." See also *Marsh v. Earl Granville*, 52 L. J. R., Ch. 189 (Fry, J.), where a condition providing that the commencement of a title should be an indenture dated, &c., but not disclosing its nature, the deed afterwards proving to be one which, but for *Price v. Jenkins*, would have been purely voluntary, such condition was held misleading.

Fry, J., intimated that several judges had, since *Price v. Jenkins*, considered such deeds revocable under the Statute of Elizabeth, irrespectively of any express power of revocation.

Mansel v. Norton.

[52 L. J. R., Ch. App. 357 ; L. R., 22 Ch. Div. 769.]

If a tenant enters into possession under a parol agreement clearly established, and one of the covenants which was to have been contained in the lease was to pay the tenant at the end of his term for unexhausted improvements, the provision to that effect is in the nature of a covenant running with the land, and binds the person who is the landlord for the time being at the end of the tenancy, and not the estate of the deceased owner (testator), who originally made the provision and devised the land to the present owner for life with remainders over.

Ex parte Isherwood, In re Knight.

[52 L. J. R., Ch. App. 370; L. R., 22 Ch. Div. 384.]

When a trustee applies for leave to disclaim a lease, terms are only imposed in a special case.

The attornment clause in a mortgage creates the legal relationship of landlord and tenant, but equity does not regard the true position of mortgagee and mortgagor to be altered, and the Court will have regard to that position and to the nature of the clause and the amount of rent reserved in settling any terms.

In *Ex parte Ladbury* (50 L. J. R., Ch. 838; L. R., 17 Ch. Div. 532) a special case for terms was shown.

COMMENT.

On the much-discussed question as to what is the real relationship between mortgagor and mortgagee, *In re Sands to Thompson* (52 L. J. R., Ch. 406; L. R., 22 Ch. Div. 614) will be a useful decision. It is that if a mortgage has been discharged more than thirteen years, the last Statute of Limitations (37 & 38 Vict. c. 57) causes time to run (having regard to sect. 7 of the 3 & 4 Will. 4, c. 27) one year after the creation of the tenancy at will caused by the discharge of the debt and end of the relationship. Consequently at the end of that time the concurrence of the mortgagee cannot be required, nor any re-conveyance demanded.

*Ex parte Webster, In re Morris.*

[52 L. J. R., Ch. App. 375; L. R., 22 Ch. Div. 136.]

The residence of the grantee of a bill of sale within the 1878 Act must, under sect. 11, be stated in the same manner in the affidavit as in the bill of sale. A variation between the two, thus—(1) In bill of sale, Boldock in Herefordshire; (2) In affidavit, Baldock in Hertfordshire, held to invalidate the bill of sale.



In re Gadd, Eastwood v. Clarke.

[52 L. J. R., Ch. App. 396; L. R., 23 Ch. Div. 134.]

After administration decree the donee of the power to appoint a new trustee appoints such new trustee, the Court approving.

In re Frank Mills Mining Company.

[52 L. J. R., Ch. App. 457; L. R., 23 Ch. Div. 52.]

The M. R. : A cost-book mining company is a common partnership, with power, recognized by Parliament, for any partner to retire and relinquish his shares upon terms which are binding on the parties, such terms being that at the expiration of the notice (treated as the date of relinquishment), if the concern be insolvent, the retiring partner is to pay the contribution to amount of the liabilities as if the concern were then being wound up. If the concern be solvent and there be a surplus after providing for debts then due, he is entitled to an aliquot share of the surplus; that is, the value of assets over liabilities. Whether the concern be solvent or insolvent the assets are to be valued as a going concern. If, then, the concern is wound up, the retiring partner's share of the liabilities would be that which he ought to pay if the concern had come entirely to an end.

The past practice relied on here to vary this position is only evidence of agreement, which we do not regard as sufficient.

In re Toomer, Ex parte Blalberg.

[52 L. J. R., Ch. 461; L. R., 23 Ch. Div. 254.]

As this decision will not be important as to cases coming under the Bills of Sale Act, 1882, and the Bankruptcy Act, 1883, it is not given at length.

It was a decision under the Bills of Sale Act, 1878. It was held that where by the doctrine of relation back an execution was swept away as though it had never existed, the title of an unrecognized bill of sale holder, which but for the

execution would have been good as against the trustee, continued good against him.

Rose v. Rose.

[52 L. J. R., P. D. & A. 25.]

The M. R.: In this case the wife has contracted for value not to bring any suit in respect of the cruelty of her husband before the contract. That is a valid contract. As I pointed out in *Besant v. Wood* (48 L. J. R., Ch. 497; L. R., 12 Ch. Div. 605), unless you allow a married woman to contract herself out of rights which she might otherwise claim, every divorce suit must be fought out to the end. There was an old idea that condonation was never final, but we otherwise decided in *Gandy v. Gandy* (51 L. J. R., P. D. & A. 41).

Mason v. Mason.

[52 L. J. R., P. D. & A. 27.]

A husband who obtained a decree for judicial separation, with damages against the co-respondent, under circumstances entitling him to a dissolution of the marriage, was held entitled in a suit commenced three years afterwards to a decree for such dissolution founded on continued adultery with the co-respondent, the Court being satisfied that the delay was owing to an expectation that the wife would return.

***In re* Orr Ewing, Orr Ewing v. Orr Ewing.**

[52 L. J. R., Ch. App. 529; L. R., 22 Ch. Div. 456.]

The M. R.: The infant plaintiff here is unquestionably entitled to a substantial share in this estate by way of legacy and residue. He brings an action for general administration, and asks that proper provision may be made for his

maintenance as a ward of Court. The testator was a domiciled Scotchman and all the executors are Scotchmen. The plaintiff is residing in England. Two out of the six executors also reside in England. The will was proved both in Scotland and England. Of about half a million which the testator had 25,000*l.* were in England, the rest in Scotland. But if people in this country are liable to pay or give security for a large sum of money, it is immaterial how the plaintiff's title arises, as to defendants served within the jurisdiction. Three were served out of the jurisdiction, viz., in Scotland. They appeared in the ordinary way (not under protest), and so submitted to the jurisdiction. From that moment they were in the same position as the others. The jurisdiction of the High Court can be exercised against a defendant who is within the jurisdiction, or is properly served out of it and submits to the jurisdiction. In a proper case a defendant in Scotland served out of the jurisdiction might move the Court to have the order for service on him discharged on the ground that he ought to be sued in Scotland. Such an application might not have succeeded in the present case, but it would have stood on a totally different footing from this resistance to a judgment at the trial.

Scotland is not a "foreign country." Since the union it is an integral part of Great Britain. It has a separate legal jurisdiction, but so had several English counties, and so still has one of them (Lancashire). At one time Wales had a separate jurisdiction, "The Court of Great Session." The judgment of this Court can be enforced in Scotland in the same way as a Scotch judgment can be enforced here. Moreover the opinion of the Scotch Courts on Scotch law is taken in England, and *vice versa*, while questions as to foreign law have to be decided on the unsworn evidence of advocates and experts.

COMMENT.

But see *Re Hawthorne, Graham v. Massey*, L. R., 23 Ch. Div. 743, and cases there cited.



Arundell v. Bell.

[52 L. J. R., Ch. App. 537.]

The M. R. : In the ordinary partnership between solicitors is there any "goodwill" to sell? If the offices do not belong to the firm there is little to sell. A particular office is changed without detriment to the solicitor's business. You cannot sell the client's papers, which are the most valuable things of all. A sale of them would not be legal and could not be justified. Nor can you sell the right of the firm's name. It may not be absolutely illegal, if the solicitor or solicitors be duly qualified (otherwise it clearly would be illegal), but one solicitor cannot practise in the name of another. Process must not be issued except in the name of the continuing partner or partners, although the name of a deceased or retired partner may be continued in the firm. There is nothing analogous to the ordinary trader's goodwill to be sold.

Even assuming that this is not so, and that there is a solicitor's goodwill which can be sold, it is contrary to the meaning of the articles to say that something called "goodwill" is to be put up for sale and sold as a partnership asset. The claim of the retiring plaintiff to a sum for "goodwill" will therefore be disallowed. The nature of the agreement on retirement, viz., that the continuing members were to carry on business, and that the retiring partner was to have a salary for six months and to manage for them, excludes any such claim. It is inconsistent with the idea of sale of goodwill to a stranger.

Hack v. The London Provident Building Society.

[52 L. J. R., Ch. App. 541; L. R., 23 Ch. Div. 103.]

The M. R. : The Building Society Act, 1874 (sect. 34), applying to reference of disputes to the Registrar of Friendly Societies, includes a claim of account against the society by a member who has mortgaged property to it. The transaction is one by the plaintiff as a member of the society.

The defects pointed out by the H. L. in *Mulkern v. Lord* (48 L. J. R., Ch. 745; L. R., 4 App. Cas. 182) have been cured by the Act. *Morrison v. Glover* (19 L. J. R., Exch. 20; 4 Exch. R. 430) is not binding on us.

Watson v. Holliday.

[52 L. J. R., Ch. App. 543.]

The right of a patentee to an account of profits made by an infringer is not a demand in the nature of unliquidated damages within sect. 31 of the Bankruptcy Act, 1869, and the amount of such profits is provable in the bankruptcy.

Ex parte Jacobson, In re Pincoffs.

[52 L. J. R., Ch. App. 561; L. R., 22 Ch. Div. 312.]

In considering whether proceedings on a debtor's summons should be stayed without security the Court will have regard to the probabilities of ultimate result.

**The Attorney-General v. The Vestry of
Bermondsey.**

[52 L. J. R., Ch. App. 567; L. R., 23 Ch. Div. 60.]

The M. R. : There is a sort of allegation in the statement of claim, that some of these gentlemen (vestrymen) voted for a resolution which involved a misapplication of the funds of the parish. Vestrymen have no right to give balls and dinners out of the rates, and have been rightly restrained from so doing. But the Attorney-General has sued not only the vestry but these six gentlemen as individuals. I will assume that the resolutions are illegal, and that these six formed the majority who passed the resolution. But inasmuch as there had been no actual misapplication of the

funds here, *i. e.*, as the resolution had not been effectuated, the individual vestrymen cannot be sued. If the funds had been misapplied they would have been liable. This is like a bill *quia timet*.

Ex parte Dyke, In re Morrish.

[52 L. J. R., Ch. App. 570 ; L. R., 23 Ch. Div. 410.]

The M. R. : It was decided by the Appeal Court, in *Ex parte Paterson* (L. R., 11 Ch. Div. 908), that a trustee may disclaim a lease, although the term, the bankrupt's interest, has come to an end. Otherwise the trustee might incur serious responsibilities. The disclaimer deprives both the landlord and the tenant of all future benefit from the clauses in the lease ; it puts an end to the lease.

In re Carey, The Queen v. Nash.

[52 L. J. R., Q. B. 443.]

The M. R. : In *In re Lloyd* (3 Mac. & G. 547) the late J. Maule asked how the mother of an illegitimate child differed from a stranger as to the right of custody of her child. I should have answered, "Because she is the mother." In *Ex parte Knee*, 1 Bos. & P. 148, the right of the mother to such custody was acknowledged by Sir J. Mansfield. Moreover, now that all the courts are courts of law and equity, the question does not depend upon mere legal rights as *habeas corpus*, but upon equitable doctrines, and regard is always had to the mother, the putative father, and the relations on the mother's side. The blood relationship is acknowledged.

Ex parte Foster, In re Foster.

[52 L. J. R., Ch. App. 577 ; L. R., 22 Ch. Div. 797.]

To support a debtor's summons a debt must be both legal and exigible.

In re **The Mutual Society.**

[52 L. J. R., Ch. App. 621 ; L. R., 22 Ch. Div. 714.]

The M. R. : A plaintiff is not bound to tell one of several defendants what portion of the evidence specially affects him. He must himself discover that.

An official liquidator need not make an affidavit as to documents. He is not an ordinary litigant, but is an officer of the court. The right course is to apply to him for documents, when he will produce them or be ordered to do so on application.

Ex parte **Nichols, In re Jones.**

[52 L. J. R., Ch. App. 635 ; L. R., 22 Ch. Div. 782.]

An assignment by a trader of the future receipts of his business is avoided by after-bankruptcy of the trader, *quoad* receipts after bankruptcy.

Reg. v. Foote.

[52 L. J. R., Q. B. 528.]

The refusal of a prisoner's application for bail in a judgment is a criminal matter, within the last clause of sect. 47 of the Judicature Act, 1873, and the Court of Appeal cannot entertain an appeal from such refusal.

Ex parte **Wilkinson, In re Barry.**

[52 L. J. R., Ch. App. 657 ; L. R., 22 Ch. Div. 788.]

The M. R. : *Ex parte Dunn* (51 L. J. R., Ch. 290 ; L. R., 17 Ch. Div. 26) does not decide that there must be a binding agreement to make future advances in order to save from being an act of bankruptcy, under the Bankruptcy Act, 1869, s. 6, sub-s. 2, a trader's assignment of all his property as security for an existing debt. If there is a *bond fide* arrangement to enable the debtor to continue his business that will do.

Dutton v. Thompson.

[52 L. J. R., Ch. App. 661 ; L. R., 23 Ch. Div. 278.]

The M. R.: There are two points—(1) Whether this voluntary settlement can stand or not. On that question the trustee, because he has been ordered to pay the costs of the action, can appeal, although he has no interest in upholding the deed. (2) Assuming that the deed is set aside, can the trustee appeal as to that part of the order which directs him to pay costs, or is that an “appeal for costs” within sect. 47 of the Judicature Act, 1873?

The deed must be set aside, as it is clear that the plaintiff did not understand what he was about when he executed it. I emphatically disagree with the many reported decisions in which such deeds have been set aside on the ground that they do not contain provisions which the Courts thought they ought to have contained, having regard to the benefit of the settlor. The only question is, whether the settlor understood the effect of what he was doing?

The omission of provisions which a provident person would have inserted may be referred to for the purpose of rebutting the allegation that the settlor understood the effect of the deed, but not further or otherwise. A person who prepares a voluntary settlement in this way (the settlor was somewhat below the average in intellect, and improvident) must be prepared to show that the settlor understood it.

Then, the deed being set aside, the trustee’s appeal becomes one for costs only. If the trustee had come into Court in an action to carry out the trusts of the settlement [Cotton, L. J.], or under the trusts of a settlement, the trustee’s appeal for costs might have been allowed (the trusts prevailing), as in *Turner v. Hancock*, 51 L. J. R., Ch. 517 ; L. R., 20 Ch. Div. 303, *ante*, p. 435.

Here the Court has set aside the deed on which the trustee bases the contract under which he is entitled to his costs.

COMMENT.

The M. R. evidently intends broadly to express disapproval of the decisions avoiding voluntary settlements on the mere absence

of powers of revocation, or the mere presence of improvident provisions, and to hold that the only true test is whether the settlor understood his deed. L.J. Cotton thought that where the claim was between the settlor and those claiming (under the settlement) adversely to him, the provisions were material for consideration; otherwise not.

Blight v. Hartnoll.

[52 L. J. R., Ch. App. 672; L. R., 23 Ch. Div. 218.]

The M. R.: The law as to what falls into the residue is substantially the same now, both as to personal and real estate. You may have a residuary bequest in various forms. In effect it must be a gift of all the personal estate not otherwise disposed of by the will. It may not even then be a true residue, for there may be property not disposed of by the will. When I speak of residue, then, I mean the residue not *professed* to be otherwise disposed of. The wording of the residuary gift is not material in showing intention. A gift of all my personal estate, except my gold watch which I give to A., is a gift of residue. The gift may be in form an exception. It is in effect as if the watch had been first given, followed by a gift of everything else. *Evans v. Jones*, 2 Coll. C. C. 516, is an authority in point. If I give my personal estate to A. except my gold watch and consols, and the gold watch and consols are not given at all, the legacies are not lapsed and void legacies within the rule, but go to the next of kin as undisposed of, and there is no true residue. But when there is a true residue, that residue is increased by any legacies which for any reason fail. The present case is quite simple. There is a gift of all the personal estate except a leasehold wharf, and then the wharf is given by the will; but the gift of the wharf is void for remoteness. Why should it not fall into the residue? It is almost impossible to find in any will an intention that a void legacy should not fall into residue. A testator does not knowingly make a void legacy. It is different as to lapsed legacies, for a testator knows that legatees may die before him. The only case in

which the testator could be taken to have contemplated the possibility of a legacy or legacies being void would be where he had expressed some doubt, *e.g.*, as to several charitable legacies, and he expresses a doubt whether some objects can take. But when a legacy fails for remoteness you cannot presume that the testator would provide for the event of its being illegal.

In *Wainman v. Field*, Kay, 507, the V.-C. held that there was no true residuary gift there. It was a question of construction of that will, as to which I agree with him. It does not guide us in construing the present gift.

Ex parte Izard, Re Bushell.

[52 L. J. R., Ch. App. 678 ; L. R., 23 Ch. Div. 75.]

A receiver or manager of a business should not, without the authority of the Court, personally make advances for the purposes. If he makes such advances with authority he will be allowed five per cent. on advances, and allowed a charge on the assets for the advance and interest.

Ex parte Griffith, In re Wilcoxon.

[52 L. J. R., Ch. App. 717 ; L. R., 23 Ch. Div. 69.]

The law as to fraudulent preference is put into definite shape and form by sect. 92 of the Bankruptcy Act, 1869 (now sect. 48 of the Bankruptcy Act, 1883).

No entanglement by a consideration of what the law was before the standard thus given is necessary. The old decisions are of value as guides, but are not to be substituted for the statute.

If the mind of the debtor was, in the opinion of the Court, influenced not by the demand of the creditor, but by the debtor's own desire to accede to that demand, and to give a preference, that is a *fraudulent* preference.

COMMENTS.

The new section (*supra*), is in the same words as the old down to the words "is adjudged bankrupt," and then proceeds thus :

"on a bankruptcy petition presented within three months" after the date of making the preference. Instead of the words "but this section shall not affect the rights of a purchaser, payee, or incumbrancer, in good faith and for valuable consideration," are these: "This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt."

The spirit of the new statute being, wisely, much more in favour of the general body of creditors, transactions in preference of particular creditors, made on the eve of bankruptcy, will be even more strictly scrutinized.

Notwithstanding the statutory limit as to time, it seems that if all the requisites of a fraudulent preference as settled before the Act exist, the transaction will be fraudulent, whether taking place within the three months' limit or not (Robson, p. 118). Of course the above decision is only one on principles.

A fraudulent preference remains an act of bankruptcy (sect. 4 *b*).

(1) Observe that the *debtor's intent* is the testing element. The words "with the view of giving . . . a preference" mean, of course, the *debtor* having that view. Apply first, then, to the whole circumstances, the test of what view the debtor had in the transaction. His animus being so important, the solution of the primary question as to whether there was an intention to favour one creditor may be assisted by ascertaining whether there was the co-existing motive of defeating another or others. In fact, there is generally such a double motive in such cases.

(2) As between the debtor and the preferred creditor consider (a) whether in the first instance the debtor communicated to the creditor the real state of his affairs (*Ex parte Hall, Re Cooper*, and above case); (b) whether the pressure was *bond fide* and in respect of an unbarred, existing, recoverable debt; and (c) as an additional element, whether the debtor was, by yielding to the pressure, enabled, or reasonably thought he should be enabled, to continue his business, or to preserve his property, for a time at least; (d) if the transaction be an alienation or security by deed or other document, the manner in which the real consideration is stated is important.

As regards conveyances of *lands* on the eve of bankruptcy, either in the old form or under the Conveyancing Act of 1881, it is more than ever necessary to state the real consideration, as (under sect. 55 of that Act) subsequent purchasers are to imply from the statement to that effect in the deed actual payment of the purchase-money. Statutes directing the implication of good faith in the inception of a transaction should have as corollaries, statutes requiring the original consideration to be truly stated (as in Bills of Sale Acts). [And see 46 & 47 Vict. c. 52, s. 4, subsect. 1 "h."] Since the above note was written, *Ex parte Hill, Re Bird*, L. R., 23 Ch. D. 695, is reported. It is sufficient if the preferring be the "substantial, effectual, or dominant" view of the debtor.

Mason v. Brentini

[L. R., 15 Ch. Div. 287], and

Re Brewn, Ward v. Morse.

[L. R., 23 Ch. Div. 377.]

If both the claim and the counter-claim be dismissed with costs, the costs of the action to be paid by plaintiff to defendant, and those of the counter-claim by the defendant to the plaintiff, the plaintiff must pay the general costs of the action and the defendant only the costs so far as increased by his counter-claim. Where both claim and counter-claim are successful the plaintiff (failing directions to the contrary) is entitled to the general costs of the action, although the general result is favourable to defendant. There will be no apportionment of costs such as would have been duplicated if the counter-claim had been the subject of a separate action, but the plaintiff is not to recover any costs fairly attributable to the counter-claim.

In re Finch, Finch v. Finch (L. R., 23 Ch. Div. 267) the M. R. said that the rule that a claim against the estate of a deceased person was not admitted on the sole unsupported evidence of the claimant was one of prudence only. The judge's duty was to direct the jury in the terms of the rule, but if the jury found for the claimant he doubted whether the verdict could be set aside.

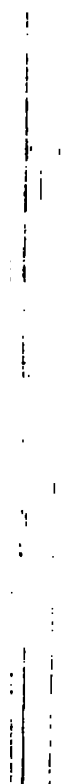
In *In re Aston* (L. R., 23 Ch. Div. 217) the M. R. said that while adhering to his decision in *Re Harford's Trusts* (13 Ch. Div. 135), it would not (for uniformity) be afterwards followed, but that where one of several trustees was of unsound mind a new trustee must be appointed in his place.

Robinson v. Ommanney.

[L. R., 23 Ch. Div. 285 ; 52 L. J. R., Ch. App. 440.]

A single woman, having power to appoint a sum by will, appointed it by will to a mortgagee, covenanting not to revoke the will. She afterwards became bankrupt, and obtained her discharge. After her discharge she revoked her will and appointed the sum to another person, and then died. A claim against her executor on the covenant not to revoke was held valid. For (1) although the covenant was, so far as in restraint of the revocation which would have arisen on *marriage*, bad, and an action would not have lain on it upon her marriage, yet (2) it was divisible, and otherwise good, and (3) the possibility of a breach of the covenant could not have been estimated for purposes of proof, and therefore the bankruptcy was no discharge.

In *Haues v. Haues* (L. R., 14 Ch. Div. 614) the M. R., and in *Featherstone's Trusts* (52 L. J. R., Ch. 75), Kay, J., followed *Lugar v. Harman* (1 Cox, 250), and held that a gift to "the children of A. and B.," B. being alive at date of will, meant to the *children* of A. and to B. *beneficially*, it not being allowable to insert the particle "of." This is important, as in *Mason v. Baker* (2 K. & J. 567) and *Re Davis's Will* (7 Jur., N. S. 118) the contrary was held. The M. R. thought the decision "very precise," but felt bound to follow it.



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